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No. 631

In the
# Supreme Court of the United States
OCTOBER TERM, 1968.

YELLOW CAB COMPANY,
a Maine corporation,
*Petitioner,*

*vs.*

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1968.

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YELLOW CAB COMPANY,
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*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Yellow Cab Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 15, 1968.

### Reference to Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit is attached as Appendix A to this petition.

### Grounds on which Jurisdiction is Invoked

The judgment of the Court below was entered on July 15, 1968 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Should a Federal Court *enforce* an arbitrator's award where the labor contract's terms expressly limiting his jurisdiction were *violated* by the arbitrator's assertion of jurisdiction?
2. Is a Federal Court review of compliance with procedural prerequisites to arbitration possible under Section 301 of the Labor Management Relations Act, 1947 *after* arbitration has taken place?
3. Should a Federal Court *enforce* an arbitrator's award where the award shows the Arbitrator asserted jurisdiction despite the fact that:
   a. The grievance was never reduced to writing as expressly required by the labor contract,
   b. The grievance was not appealed until 84 days after the employer's decision to deny it, despite the labor contract provision that grievances not appealed within 20 days "shall be considered as settled on the basis of the last decision and shall not be subject to further appeal."
   c. The labor contract expressly provided "The jurisdiction and power of the arbitrator shall be strictly limited to the application of the terms and provisions of this Agreement . . ."
4. Does an award of over a year's "back pay" for a period during which the arbitrator expressly ruled the grievant *was not entitled to employment* show sufficient partiality and bias that a court should vacate (or refuse to enforce) the award under the provisions of the U. S. Arbitration Act?

## Statutes Involved

The statutory provisions involved are Section 301 of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. Section 185) and Sections 9 and 10 of the U. S. Arbitration Act (61 Stat. 669, 9 U.S.C., Sections 9 and 10). The text of these statutes is set forth in Appendix C.

## Statement of the Case

This action was brought by Yellow Cab Company's petition to vacate a labor arbitrator's award of back pay to a discharged employee. Relief was requested because the arbitrator exceeded his contractual jurisdiction and authority and the award exhibited evident partiality and bias. On cross-motions for summary judgment the District Court denied petitioner's motion and, granting the prayer of the cross-petition, ordered enforcement of the award. The Court of Appeals affirmed the District Court.

The facts are:

A taxicab driver was discharged when, three times within the course of a single week, he returned his cab to the garage or requested it to be towed in before the end of his shift. He complained of fumes in the three different cabs, but the employer's inspection of and comments of other drivers of the same cabs failed to confirm the presence of any fumes or any defect to which they could be attributed. (App. 15-19, 4)*

Three days after the discharge the union interceded for the discharged driver at a grievance meeting held on May 13. The employer representative said the driver "was fired for being unsuitable for the job and that was

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* References are to the printed appendix, certified by the Clerk of the Court of Appeals as part of the record.

that." During the following 70 days the union made no attempt to communicate with the employer on this matter. Then, at a grievance meeting, the union attempted to reopen the subject, but the employer refused to change its original decision. 84 days after the May 13 meeting the union requested arbitration. (App. 4-5)

No grievance had been put into writing and the appeal was not made within 20 days of the employer's May 13 decision, both of which requirements were specifically set forth in the labor contract (App. 11-12) which also contained a provision stating (App. 13):

> "The jurisdiction and power of the arbitrator shall be strictly limited to the application of the terms and provisions of this Agreement * * * and he shall have no jurisdiction or power to alter or modify, in whole or in part, any provisions of this Agreement."

Nevertheless, the Employer, following the rule indicated in *Local Union No. 51* v. *Illinois Power Co.*, 357 F(2d) 916 (CA 7, 1966); *cert. den.* 385 U.S. 850 (1966), joined in the submission to arbitration, but protested the jurisdiction of the arbitration because the contractual prerequisites to arbitration had not been met. The arbitrator dismissed this contention with the comment that "numerous [unwritten] grievances have been presented by the union . . ." (but with no comment that any such grievances had been arbitrated) and a conclusion that the 20-day period for appeal to arbitration commenced with the union's attempt to reopen the case (70 days after the employer's May 13 decision) because many other discharged employees had been reinstated and "The company may have regarded its [May 13] decision as final. The union apparently did not regard the company's decision as being unsusceptible to change . . ." (App. 24-25)

The arbitrator ruled "the failure of the company to give a warning to the grievant renders the discharge unjust," and "Since the discharge was without just cause, it is clear that the grievant is entitled to his back pay up to the time of this award". (App. 30). The "clarity" of the decision to award back pay was clouded by the further ruling that the grievant, 9 days after his discharge, disqualified himself as an employee (App. 34). "Back Pay" for more than a year following this date was awarded (App. 47).

The District Court refused to review the arbitrator's determination relating to procedural arbitrability, but nevertheless found "that the Arbitrator did not exceed his authority under the collective bargaining agreement and that it does not appear that the Arbitrator in his decision and award was biased or partial to the union." (App. 54)

Even though the arbitrator's ruling on procedural matters dealt with his own jurisdiction and power to rule, the Court of Appeals held that the procedural questions involved the arbitrator's "construction of the contract" which construction should not be overruled by the courts and, further, it did not "find an inconsistency [in the award of back pay] so glaring as to require us to vacate the arbitrator's award." (Appendix A, pages 4a, 5a).

**Basis for Federal Jurisdiction**

Suit was brought in accordance with the Federal Arbitration Act (61 Stat. 669, 9 U.S.C. Sections 9, 10). The District Court derived jurisdiction under Section 301 of the Labor Management Relations Act, 1947, (61 Stat. 156, 29 U.S.C., Section 185).

## REASONS FOR GRANTING THE WRIT

There are three special and important reasons for granting the writ of Certiorari in this case:

1.

There is a conflict between the decision in this case and that of the Second Circuit Court of Appeals in *Torrington Co.* v. *Metal Products Workers Union* where the court stated, "We hold that the question of an arbitrator's authority is subject to judicial review * * *".[1]

2.

*This Court* should settle the current widespread uncertainty concerning the reviewability of an arbitrator's ruling on his own jurisdiction and power. *This Court's* statement that "When the arbitrator's words manifest an infidelity to this obligation [to interpret and apply the collective bargaining agreement] courts have no choice but to refuse enforcement of the award"[2] is at the root of the uncertainty and should be clarified.

3.

This Court should exercise its power of supervision to prevent enforcement by the lower courts of an arbitrator's award wherein the specific provisions of a contract are violated by the arbitrator's exercise of jurisdiction.

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[1] 362 F. 2d 677 at p. 680 (CA 2, 1966)

[2] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 at p. 597 (1960).

1.

## THE CONFLICT

In the *Torrington*[3] case the arbitrator "implied" a long standing practice not stated in the labor contract and issued an award in accordance with that practice. The court *vacated* the award since the arbitration clause stated that the arbitrator "shall have no power to add to" the contract.

In this case the arbitration clause was almost identical in substance to that in *Torrington*. It stated the arbitrator had no "jurisdiction or power * * * to alter or modify" the provisions of the labor contract. In asserting jurisdiction the arbitrator altered the contract provisions which required that grievances be placed in writing and appealed within 20 days of the Employers' decision. The Court *enforced* the award.

Thus in the Second Circuit the arbitrator is not permitted to *add* a provision to the contract while in the Seventh Circuit he is permitted to *violate* a provision that is already there—and the court will not even review his decision to determine whether or not he committed the violation. A court's power and responsibility to review must be the same in either case since the parties certainly did not agree that the arbitrator's power to *add* is subject to any different standard of review than his power to *alter*.

2.

## THE IMPORTANT FEDERAL QUESTION

Whether or not an arbitrator should, *before arbitration*, be permitted to rule on his own jurisdiction and power has been settled by this Court. In the famous

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[3] 362 F2d 677 at p. 681 (CA 2, 1966)

Steelworkers' trilogy decisions[4] it was established that an arbitrator should so rule "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[5] And in *John Wiley & Sons* v. *Livingston*[6] it was established that procedural questions should be submitted to the arbitrator for his decision.

To justify the effect of these rulings which might result in an erroneous ruling by the arbitrator the Court, with reference to both substantive and procedural questions, indicated that the arbitrator's decision *after it is made* is subject to judicial review. In *Enterprise*[7] the Court said:

> ". . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

And in *Livingston*[8] this Court specifically affirmed the decision of the Second Circuit in which it was stated:

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[4] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[5] *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, at pp. 582-583 (1960)

[6] 376 U.S. 543 (1964)

[7] 363 U.S. 593 at p. 597 (1960)

[8] 376 U.S. 543 (1964)

> "Of course, if the arbitrator . . . should make an award which is completely without root and foundation in the collective bargaining agreement itself, we have no doubt that the courts would have no choice but to refuse enforcement of the award. . . ."[9]

The *Trilogy* decisions created a storm of interest in the field of labor relations. Virtually every leading legal publication has had at least one important article dealing with the meaning of and possible ramifications of the principles there established. And, following 1960, a number of arbitrator's awards have been brought to litigation in suits to vacate or to enforce because of an alleged error in an arbitrator's ruling on his own jurisdiction.[10]

*This Court* has not yet considered such a case.

The instant case presents an ideal vehicle for this Court to settle with finality the reviewability of an arbitrator's ruling on his own jurisdiction. The labor contract provisions are clear, definite, and are identical in substance with those incorporated in thousands of labor contracts. There are no disputed or unique facts which would cloud the decision or limit the universality of its application.

The cross petitions here will permit a decision defining a court's power to vacate *or* to enforce an award, or to refuse to do either.

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[9] *Livingston* v. *John Wiley & Sons Inc.*, 313 F. 2d 52 at p. 59, footnote 5 (CA 2, 1963)

[10] See cases cited at page 680 in *Torrington Co.* v. *Metal Products Workers Union*, 362 F. 2d 677 (CA 2, 1966). See also: *Humble Oil & Refining Co.* v. *Local Union 866*, 271 F. Supp. 281 (SD NY, 1967); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 275 F.Supp. 776 (E.D. Pa., 1967).

3.

## THE NEED FOR THE EXERCISE OF THIS COURT'S POWER

This simple case raises a number of vital matters of policy and law. Among these are the following:

Can the Federal Courts, under Section 301 of the Labor Management Relations Act, 1947[11] deny enforcement of specific provisions of a labor contract? Certainly it is no longer contended that the courts should review the *merits* of an award where the parties themselves have agreed that the arbitrator's award shall be final and binding. However, the provisions dealing with the arbitrators' jurisdiction can be violated *only by him* when he asserts jurisdiction improperly or refuses to interpret and apply only the contract before him. Thus there is *no* remedy for an arbitrator's error in this respect unless the Courts will review this aspect of his decision. Otherwise the stated limitations are reduced from binding contractual commitments to mere directions which the person intended to be controlled may ignore at will.

An arbitrator deciding on his own jurisdiction is subject to a clear conflict of interest. If he accepts jurisdiction, the additional time spent considering the merits of the case will increase his fee. Such a built-in conflict should not be permitted to cloud the arbitration process and diminish the confidence of both unions and employers in using it. The arbitration process has been established as a desirable one for the settlement of industrial disputes. But it is *not* perfect. Paul R. Hayes,[12]

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[11] 61 Stat. 156, 29 USC, Sec. 185. (Appendix C, pp. 8a-9a)

[12] In his *Storrs Lectures on Jurisprudence* at the Yale Law School, 1964, as published in *Labor Arbitration—A Dissenting View* (Yale University Press, 1966)

now a Federal Judge, speaks, from 16 years of experience as an arbitrator, of "rigged awards", incompetent arbitrators, political pressures on arbitrators, and other factors which can undermine the procedure. A policing of the procedure—and only the federal courts can do this—is necessary if bad decisions are to be weeded out and the standards of the process maintained at a respectable level to continue its acceptability as a vehicle for settling industrial disputes.

In this case, the arbitrator awarded back pay for a period of over a year following the date he ruled the grievant was not entitled to employment. Such a ruling offends common sense and rationality. It has been said that the "pragmatic" approach of arbitrators and the exercise by them of flexibility in fashioning remedies[13] is desirable. But what are the outer limits of this philosophy? Since the parties have agreed to submit to arbitration, are they bound by *any* remedy the arbitrator assesses? Surely there are some outer limits to this power. An arbitrator need not state reasons for his decision. When he does, however, and his reasoning clearly offends common sense and acceptable concepts of fairness, the award should not be enforceable.

The Federal Arbitration Act[14] specifically provides the power for a Federal Court to vacate an arbitrator's award where he has exceeded his powers or there is "evident partiality." This Act has not been referred to in the recent decisions concerning *labor* arbitrator's awards. This Court should indicate whether that statute

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[13] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 at p. 597 (1960)

[14] 61 Stat. 669, 9 U.S.C. Section 10(b) (Appendix C, pp. 7a-8a)

is applicable to a suit to vacate a *labor* arbitrator's award as well as the degree of partiality which must be shown in the arbitrator's decision to require such an order.

Further needs for clarification of the law in this area are more extensively stated in a recent article in The Business Lawyer, July 1968, page 1035.

## Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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# APPENDIX A

## Opinion of the United States Court of Appeals for the Seventh Circuit

July 15, 1968

Before HASTINGS, FAIRCHILD and CUMMINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Yellow Cab Company appeals from a judgment order of the district court entered January 12, 1968 enforcing an arbitration award and denying appellant's motion for summary judgment vacating the award. Appellant, a Maine corporation, operates a fleet of taxicabs in Chicago, Illinois. Appellee union[1] (the union) is the certified collective bargaining agent of appellant's drivers.

On May 10, 1966, appellant discharged Harold Ray, one of its cab drivers, on the ground that he was unsuitable for employment as a driver. The union intervened on Ray's behalf at a grievance meeting on May 13. At that meeting appellant refused to reconsider its discharge of Ray. There was no further communication on the matter between appellant and the union until ten weeks later when the union, at a regular grievance meeting, attempted to discuss the reinstatement of Ray. Appellant refused to discuss the matter. Two weeks later, on August 5, 1966, the union requested arbitration.

At the outset of arbitration proceedings appellant challenged the arbitrability of the dispute, contending the union had not complied with contractual requirements that grievances be submitted in writing and that requests

[1] Democratic Union Organizing Committee, Local 777, S.I.U.N.A., AFL-CIO.

for arbitration be submitted within twenty days after the Company's adverse decision on a grievance.[2]

The arbitrator rejected the first of these contentions on the ground that appellant had not previously enforced the writing requirement, although numerous grievances had been processed. He rejected the second contention on the ground that the twenty-day limitation on requests for arbitration should be measured from the date of the last discussion of Ray's discharge between appellant and the union. The arbitrator construed the arbitration provision of the contract as having the purpose of encouraging voluntary settlement of grievances prior to arbitration. He found that many discharge grievances concerning appellant's drivers had been settled in the course of time by reinstatement and concluded that the purpose of the grievance procedure would be frustrated if the contract were narrowly construed to require resort to arbitration within twenty days of the Company's first denial of a grievance. As he saw it "the issue * * * is whether or not there was a reasonable basis for the union's belief that the grievance was still open for dis-

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[2] ARTICLE IV—SUSPENSION, DISCHARGE AND LAYOFFS—GRIEVANCE PROCEDURE

* * *

(a) A statement in writing by the aggrieved employee of his version of the controversy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance.

* * *

ARTICLE V—ARBITRATION

Section 1—If the parties herein shall be unable to reach a settlement of a grievance, either party may submit the grievance to arbitration by sending to the other party by registered or certified mail within twenty (20) days * * * a notice in writing in which the matter to be arbitrated is clearly set forth.

cussion and possible settlement." He found that there was.

On the merits the arbitrator concluded that Ray's discharge was unjust. He awarded Ray back pay in the amount of $3,033.66. However, he denied reinstatement, finding that a letter which Ray wrote to appellant's insurance carrier following his discharge revealed a motivation that disqualified him as an employee.

Appellant petitioned the district court on May 26, 1967 to vacate the arbitrator's award on grounds that he exceeded his power and displayed evident bias and partiality. The union cross-petitioned for enforcement of the award, and both parties moved for summary judgment. The court, in its memorandum order granting summary judgment for the union, refused to review the arbitrator's determination of the procedural questions and found that the arbitrator neither exceeded his authority nor displayed bias or partiality.

The first question presented by this appeal is whether the arbitrator's decision on questions of procedural arbitrability are subject to judicial review. The Supreme Court has held that disagreements concerning procedural arbitrability should not be considered as separate disputes, but as aspects of the dispute which called the grievance procedure into play and should therefore be left to the arbitrator. *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964). It cannot be supposed that the courts, recognizing the arbitrator's exclusive authority to determine procedural questions, may upset the arbitrator's determination in a review proceeding, unless it is arbitrary, capricious or not adequately grounded on the applicable collective bargaining agreement. See *Dallas Typographical Union No. 173* v. *A. H. Belo Corp.,* 5 Cir., 372 F.2d 577 (1967).

The arbitrator's resolution of procedural questions is a part of his decision on the merits of the dispute, as the Supreme Court suggested in *Wiley.* As such, it is subject to the limited standard of review annunciated in *United*

*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960):

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597. *Torrington Co.* v. *Metal Products Workers Union Local 1645*, 2 Cir., 362 F.2d 677 (1966).

The arbitrator's decision, including his resolution of the procedural questions, clearly draws its essence from the contract. Appellant does not suggest that his decision on the merits is not based on the contract. His decision that compliance with the requirement of written grievances had been excused was based on the parties' practical construction of the contract. "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). The arbitrator's decision that the period of limitation for filing arbitration requests runs from the parties' last discussion of the grievance was based on his interpretation of the contract in light of the practice of the shop.

We do not sit to pass upon the arbitrator's construction of contractual provisions. "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers*

v. *Enterprise Wheel & Car Corp., supra* at 599. *Avco Corp.* v. *Mitchell*, 6 Cir., 336 F.2d 289 (1964).

We find nothing in *Torrington Co.* v. *Metal Products Workers Union Local 1645, supra*, that compels us to an opposite conclusion. The court there applied the same standard of review that we apply here, but concluded that the arbitrator's award did not draw its essence from the contract. That award was based on a company policy that had no foundation in the contract. The arbitrator there concluded that the policy was "carried over" when an existing contract was continued with modifications.

Appellant's contention that the arbitrator was biased rests solely on the alleged "outrageous" inconsistency between his award of back pay to Ray and his denial of reinstatement. The Supreme Court has recognized the need for flexibility in arbitration remedies. See *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra.* The contract contains no provision on remedies, leaving the arbitrator free to exercise his discretion. The award of back pay to a wrongfully discharged employee is obviously within the authority of an arbitrator. Arbitration would be meaningless if the arbitrator lacked the authority to redress the economic wrong inflicted on such an employee.

We do not find an inconsistency so glaring as to require us to vacate the arbitrator's award. The letter found to disqualify Ray for employment was written after his wrongful discharge.

The judgment is affirmed.

AFFIRMED.

## APPENDIX B

### Judgment

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Monday, July 15, 1968

Before
Hon. John S. Hastings, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

YELLOW CAB COMPANY,
Petitioner-Appellant
No. 16688 vs.
DEMOCRATIC UNION ORGANIZING COMMITTEE, LOCAL 777, S.I.U.N.A., AFL-CIO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

## APPENDIX C

### Statutes Involved

U.S. Arbitration Act, 61 Stat. 669, 9 U.S.C., Sections 9 and 10:

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. July 30, 1947, c. 392. § 1, 61 Stat. 669.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, § 1, 61 Stat. 669.

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Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. Section 185, (Taft-Hartley Act, Section 301):

§ 185. Suits by and against labor organizations.

(a) Venue, amount, and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter

and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction.

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process.

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency.

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, ch. 120, title III, § 301, 61 Stat. 156.)

SUPREME COURT, U. S.

FILED

OCT 10 1968

JOHN F. DAVIS, CLERK

No. 631

In the

# Supreme Court of the United States

OCTOBER TERM, 1968.

YELLOW CAB COMPANY,
a Maine corporation,

*Petitioner,*

*vs.*

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

*Respondent.*

# APPENDIX

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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# APPENDIX

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**Memorandum Order of United States District Court for the Northern District of Illinois, Eastern Division:**

UNITED STATES DISTRICT COURT

* * (Caption—No. 67 C 890) * *

Memorandum Order

This cause is before the court on the plaintiff's petition which seeks to vacate an arbitrator's award and on the cross-petition of defendant which seeks an order of this court confirming or enforcing that award. Each party has

made a motion for summary judgment and the court, having examined and considered the said motions, together with the pleadings herein, the briefs submitted by counsel and the supporting affidavit submitted by defendant, finds that there is involved here no genuine issue as to any material fact.

The court further finds that the Arbitrator did not exceed his authority under the collective bargaining agreement and that it does not appear that the Arbitrator in his decision and award was biased or partial to the union.

Petitioner contends, in the instant proceeding, that there was a failure to comply with certain contractual provisions relating to procedural steps to be taken in the matter of grievances and their submission to arbitration. This contention was also raised before the Arbitrator who considered and ruled upon it, holding that the procedural requirements had been met. This court will not review that determination. The United States Court of Appeals for the Seventh Circuit in Local Union No. 51, International Brotherhood of Electrical Workers, AFL-CIO vs. Illinois Power Co., 357 F.2d 916 (which cites John Wiley & Sons vs. Livingston, 376 U.S. 543) has held that it is for the Arbitrator to determine procedural questions which grow out of the dispute and bear on its final disposition.

The court is of the view that the contentions made by defendant cross-petitioner in support of its motion for summary judgment should be sustained.

It is Ordered, Adjudged and Decreed that—

(1) The motion made by defendant cross-petitioner, Democratic Union Organizing Committee Local 777 S.I.U.N.A., AFL-CIO, for summary judgment in its favor,

dismissing Petitioner's petition and confirming and enforcing the decision and award of the Arbitrator be and it hereby is granted.

(2) The motion made by petitioner cross-defendant, Yellow Cab Company, for summary judgment in its favor be and it hereby is denied.

(3) Each of the parties will pay its own costs.

Enter:

/s/ J. S. Perry
Judge

Dated: Chicago, Illinois
January 12, 1968.

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**Decision and award of Arbitrator:**

American Arbitration Association, Administrator

| | |
|---|---|
| In the matter of the Arbitration between YELLOW CAB COMPANY and DUOC, LOCAL 777, TS&AW, SIUNA, AFL-CIO. | No. 51 30 0202 66 |

Decision and Award of Arbitrator

Pursuant to the collective bargaining agreement between the parties and pursuant to the procedures of the American Arbitration Association, the undersigned was designated arbitrator to hear a grievance between the Yellow Cab Company, sometimes hereinafter referred to as the company, and the Union involving the discharge of Harold Ray, sometimes hereinafter referred to as grievant. The hearings were held at the offices of the American Arbitration Association, Chicago, Illinois, on November 28, and December 15, 19, and 20, 1966, and on January 5, 1967. The appearances were:

Kirkland, Ellis, Hodson, Chaffetz & Masters
by Emil F. Meier
appeared on behalf of the company,
Katz & Friedman
by Irving M. Friedman
appeared on behalf of the union.

The arbitrator was supplied with a stenographic transcript consisting of 674 pages and a total number of 89 exhibits were introduced, 48 by the company, 40 by the union, and one joint exhibit. Post-hearing briefs were filed by the parties and were received by the arbitrator on or about February 7.

## Background Facts

On May 10, 1966, grievant was discharged from his position as a cab driver for the company because he was "not suitable for the work" (42). Grievant had been an employee of the company for three months in 1926, for two years between 1942 and 1944, for three months in 1960, and from March, 1962 until his discharge in May, 1966 (R 43). A. H. Rhodes, the General Manager, made the decision to discharge grievant (41). The reason for his decision was that grievant had had his cab towed in on May 3 and May 7, 1966, and that the company thought that the towing on those occasions had been unnecessary (44).

There were three incidents between May 3, 1966 and May 7, 1966, which were out of the ordinary. Each of the three involved a different cab, and the relevant facts of each will be set out separately below.

On May 3, 1966, grievant became ill while driving his cab. He testified the cause of this illness to be fumes entering the cab (339-40). He called for a tow truck and had

the cab towed into the garage (341). On May 4, 1966, the cab was tested for fumes by two members of the garage personnel, a mechanic and the assistant supervisor (131). They rode for approximately 7 miles at speeds ranging from 10 to 60 miles per hour (90). They detected no fumes (91, 121). No test utilizing any equipment especially designed to detect fumes was conducted (104). There was a conflict in testimony as to whether leaks in an exhaust system always make some noise audible over ordinary motor noises (93-4, 431). The daytime driver of the cab testified that he had never had trouble with fumes in the cab, and more particularly, that he had not had trouble with fumes in the cab during the first week in May, 1966 (133, 142). A previous daytime driver of the cab testified that he had never had trouble with fumes in the cab and that grievant was constantly complaining about non-existant difficulties with the cab (616, 622-3).

On May 4, 1966, grievant was issued a different cab. He drove the cab back to the garage after only four trips and three hours (351, Co. Ex. 4). He stated at the hearing that he had again become ill while driving from fumes (351). When he returned the cab to the garage, however, he refused to state any grounds for his action (352-3). He stated that he had been unable to shut off the air intake system in the cab (350). The regular driver of this cab testified that he had not had any trouble with the cab either before or after May 4, 1966 (581). His meter envelopes showed that he had worked full days with this cab both immediately preceding and immediately following the day grievant had the cab (Co. Exs. 36-40). The written statement grievant gave the company to explain his actions on the day in question did not mention fumes or any other trouble with the cab (Co. Exs. 5 and 6).

A considerable amount of evidence relating to the heating and ventilating system on the cars used by the company was introduced. These automobiles have the intakes for the heating and ventilating system directly under the headlights at the front end of the cab (100). Exhibits were presented which tend to show that the exhaust from any vehicle in front of a cab will enter the air intake system directly (Union Exs. 23-33). Other evidence was introduced which tends to show that many automobile manufacturers place air intakes at the base of the windshield where they are more removed from the source of exhaust fumes on the cars ahead (Union Exs. 34-36).

Grievant testified that it was not unusual for a cab to wait for up to two hours in the cab line at O'Hare International Airport (409). A driver for the Checker Cab Co. —which uses cars similar to those used by the company— testified that on one occasion he was rendered unconscious while waiting in the cab line at O'Hare (559). He said he observed two drivers for the company who also appeared to be unconscious (558-9). All three had been in the cab line for over an hour (560, 563). He was told at the time that he had been overcome by exhaust fumes (561). A mechanic for the company testified that if the air intake was jammed open, exhaust fumes from the vehicle ahead would enter the cab (428).

Grievant had a third cab towed in on May 7, 1966. He was on his first run, and the cab kept dying (358). The tow truck driver could find nothing wrong with the cab, and told grievant to drive it in (358, 145-6). Grievant refused, stating that besides the motor dying there were several other specific defects in the cab, including sulphuric acid fumes in the passenger compartment (358-9) These fumes were from the battery in the trunk (361). He told the driver he considered the cab a safety hazard

(359). Upon his return to the garage, grievant was told he could not have another cab until he had talked with the General Manager of the Company, Mr. A. H. Rhodes, on the following Monday, May 9, 1966. Grievant went to see Mr. Rhodes on May 10, 1966, after having made an appointment, and was told that he was discharged because he was "not suitable for the work."

A mechanic testified that he had put a new battery and alternator into the cab on the morning of the seventh, and that they had tested out perfectly (92-3). Another mechanic testified that there is no wall between the passenger compartment and the trunk where the battery is located (413). During the two years that this witness had driven for the company, he had often had trouble with battery fumes (418). Other drivers often complain about acid fumes (419). The regular driver of the cab testified that he often had trouble with the cab, on the average of once a week (181-2). He had noticed acid fumes in the cab on several occasions during the week preceding May 7, 1966, and had reported the trouble (191-2). The mechanic who inspected the cab after it was towed in testified that it seemed to run well, and that he did not notice any acid fumes (165-6). This witness, however, admitted that he did not particularly like the grievant, (167) and that he knew grievant was in trouble with the company when he made his inspection (172). The cab was removed from service by accident within a month of the occasion in question (630-1), and although it would have required only two hours work to return it to service, the company did not do so (637).

Although these three occasions were given by the company as the basis for the discharge, there was another previous occasion where grievant had noticed fumes in his cab which should be noted. On March 27, 1966, grievant

noticed fumes in his cab while driving from O'Hare airport (330). He became too sick to drive, so he called a tow truck and had his cab towed into the garage (331). Grievant then went to Weiss Memorial hospital (332). The doctor there told him that he did not have the facilities to run a carbon monoxide test, anad that grievant would have to go to Wesley Memorial Hospital to get one (332-3). Grievant requested that the Safety Department of the company provide him transportation to Wesley. There was a misunderstanding between the Safety Supervisor and grievant, resulting in the Safety Supervisor's leaving grievant at Weiss (334-4, 603-7). Grievant went home (334). He was off work for a week or ten days (335). He filled out a statement relating to the incident for the company in which he said that he suffered some loss of memory (336, Union Ex. 11). The company tried to persuade him to remove that statement, but grievant refused (337-8).

The mechanic who fixed the cab testified that he had replaced the entire exhaust system because a piece of the tail pipe had broken off (558). This was the same cab grievant had on May 3, 1966. Grievant appears to be quite concerned about carbon monoxide poisoning, and has collected a considerable amount of literature relating to it (344). Some of this literature was admitted into evidence (Union Exs. 12-13).

Grievant conducted several campaigns while he was employed by the company. In 1964, he ran for president of the union (374-5). He had also conducted one-man campaigns relating to wages and safety conditions in garages and cabs (375-6). During the course of these various campaigns, grievant has made critical and derogatory remarks about both the company and the union leadership. These statements were made in open letters to the drivers,

handbills, and articles and letters to the editor in Chicago newspapers (Union Exs. 14-18). On several occasions, grievant publicly accused the company of sending drivers out with cabs which accumulated so much carbon monoxide that they were "mobile gas chambers." (Union Ex. 18.) Mr. A. H. Rhodes, the man who decided to fire grievant, said that he was aware of grievant's activities and that many of grievant's public statements were in the file he considered before he decided to discharge grievant (46-7, 216-21).

The company presented evidence that the grievant desired to be discharged. One company witness said grievant on several occasions asked him what he had to do to get fired (251-2). Grievant told him that he wanted to be fired so he could get unemployment insurance for 26 weeks, and then he would be 62 and could go on social security (253). This was denied by grievant (368). He claimed that he never made any statement of this nature. The company witness testified that these conversations were in March or February, 1966. However, grievant was 62 in December, 1965 (327). Another company witness asserted that he overheard the conversation testified to by the first witness, and that the conversation was as he testified (618, 621).

Although it was usual company policy to warn a driver before discharge (225), grievant was not warned (225-6, 361). The company did not explain why. Employees who have been discharged are often rehired (229). Some have been discharged and rehired more than once (232). Some who were discharged for stealing from the company has been rehired (235-6). The union and the company meet nearly every Friday to discuss reinstatement of discharged men. Many men regain their jobs as a result of

these meetings even though they were discharged for stealing or drinking on the job (230, Union Ex. 10).

The grievant was not allowed into the meetings regarding his grievance even though the union so requested (285-6, 296). The company nearly always grants a request of this nature (291, 308). The company refused to be specific about the reasons for grievant's discharge (285-6, 296), and two company representatives made remarks about what a gadfly grievant was and that the company would rehire him if the union would shut him up (305).

The company asserted that grievant's actions since his discharge indicate that he did not want to be rehired. On May 17, grievant wrote to Senator Abraham A. Ribicoff complaining about the alleged unsafety of the air intake system on the company's cars (Union Ex. 18). On May 19, 1966, grievant wrote to the company's insurance carrier about alleged unsafe conditions in specified company garages (Union Ex. 17). In the May 19 letter, grievant alleged that the boilers in these garages were unsafe. However, grievant admitted that he had not inspected the boilers prior to writing the letter (516-9). He asserted that he had stopped at all but three of the garages on the list during the course of his employment (526), and that these garages did not have facilities for exhausting paint spray fumes, another alleged unsafe condition (527). He stated that he wrote the letter because he felt it was his duty as a citizen and that he would have written it if he had not been discharged (532-3). He did not know whether or not he had been in the garages listed in the letter of May 19 within six months of the time he wrote it (534).

Finally, grievant asserted that he could not get necessary repairs made on his cab (373, 451). This assertion

was denied by the garage manager (634). Grievant asserted that at one point he had been forced to go to a company official at the main office to get necessary repair work done (369-70, 373).

Relevant Contract Provision

The relevant contract provisions read as follows:

"Article IV—Suspension, Discharge and Layoffs—Grievance Procedure.

"Section 1—Without limiting, in any way, the grounds of just cause for discharge, the Company shall have the right to suspend or discharge any chauffeur guilty of the following offenses:

(1) Use of intoxicants while on duty;
(2) Dishonesty;
(3) Gross carelessness in operation of cab;
(4) Discourtesy to patrons;
(5) Failure to report an accident;
(6) Having an accident involving serious personal injury caused by his negligence;
(7) Excessive accident frequency;
(8) Consistent low bookings;
(9) Excessive unpaid mileage;
(10) Excessive gasoline consumption;
(11) Habitual irregularity of attendance or failure to observe written Company rules.

• • •

"Section 5—Any other grievances including those involving the suspension or discharge of an employee shall be submitted by the Union directly to the Company's representative at the Central Office, as provided in Step 2 of the grievance procedure.

(A) A statement in writing signed by the aggrieved employee of his version of the contro-

versy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance.

(B) Any employee who has been suspended or discharged shall be afforded the opportunity of a hearing, accompanied by the Union's representative before the representative of the Company.

"Section 6—Any grievance which is not appealed in writing from one step of this grievance procedure to the next step within ten (10) days after such decision shall be considered as settled on the basis of the last decision and shall not be subject to further appeal, provided, however, that in the case of grievances which may be referred to arbitration, the time for appeal shall be twenty (20) days rather than ten (10) days."

Discussion

One preliminary matter should be dealt with. Some of the evidence presented at the hearing indicated that the grievant believes, or at least at one time believed, that his discharge was the result of collusion between the company and the union (CF: Co. Exs. 11 and 11A). At the conclusion of the hearing the grievant stated that he would not offer any evidence of such collusion (655). He also stated that he had been given a full and fair hearing of the grievance (656). The arbitrator regards the charge of collusion as withdrawn and will accordingly make no decision regarding the matter.

At the outset of the case the company has challenged the right of the claimant to arbitration on the ground that

he has failed to comply with the requirements of Section 5(A) of Article IV which reads as follows:

> "(A) A statement in writing signed by the aggrieved employee of his version of the controversy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance."

The company concedes that written grievances and statements have not been previously required and that numerous grievances have been presented by the union both before and after Ray's discharge, which were not reduced to writing. The company also relies on Article V, Section 1, which reads as follows:

> "Section 1—If the parties herein shall be unable to reach a settlement of a grievance, either party may submit the grievance to arbitration by sending to the other party by registered or certified mail within twenty (20) days, or within the additional period of ten (10) days, as extended by written agreement of the parties, after the decision of the representative of the Company, a notice in writing in which the matter to be arbitrated is clearly set forth."

It contends that the company representative gave the decision of the company on May 13, and no request was made for arbitration until August 5, 1966, despite the fact that the grievance was in the hands of the union attorneys as early as May 20. June 2 it claims was the last day on which the case could be taken to arbitration.

It appears clear from the provisions of Article V that the purposes of the procedure established is to encourage the settling of grievances between the parties prior to the time they are taken to arbitration. The record shows

numerous grievances settled by the parties including many discharges which were reduced to reinstatements. Although the company on May 13, 1966 rejected the grievance, there is nothing in the record to suggest that this of itself terminated the possibilities of the parties' reaching a settlement of the grievance. The company may have regarded its decision as final. The union apparently did not regard the company's decision as being unsusceptible to change and accordingly reopened the grievance for reconsideration on a later date. The purposes of the grievance procedure would be frustrated if the provisions of the agreement are narrowly construed to require that arbitration must be resorted to when the company first denies grievances. Experience dictates that what is apparently a firm position may yield to change or compromise in the course of time and in the course of discussions.

The issue as the arbitrator sees it is whether or not there was a reasonable basis for the union's belief that the grievance was still open for discussion and possible settlement. The arbitrator cannot say on the face of the record that there was no basis for this belief. Accordingly it is the arbitrator's opinion that the twenty day period within which arbitration is to be requested should be measured from the last discussion of the matter between the union and the company. Arbitration in this case was requested within the twenty-day period and there is therefore no substantial basis for the company's claim that the contract provisions had not been complied with.

We next come to the claim of the union that the grievant was denied his opportunity for a fair hearing under provisions of Article IV, Section 5(B), which reads:

> "(B) Any employee who has been suspended or discharged shall be afforded the opportunity of a

hearing, accompanied by the Union's representative before the representative of the Company."

The grievant was suspended on May 7 and was told to see Mr. Rhodes on the following Monday, May 9. On that day he called Rhodes and asked if he could bring someone from the union with him. Rhodes agreed to this. Later the grievant called Rhodes to say he could not get anyone from the union and it was then agreed that, at the grievant's request, he would come in the next day.

After being kept waiting for some period of time, the grievant was seen by Mr. Rhodes. He came in without a union representative. He was told he was discharged because he was unsuitable for the work. At this point, the grievant testified "with that I left." There is nothing in the record to indicate that Ray was not permitted to make any presentation that he wished to make and he did not in fact offer any facts or arguments bearing upon the discipline imposed against him. On the following Friday, the regular weekly grievance meeting took place. The Ray case was one of the cases considered. No arguments were advanced by the union committee except that a request was made that the grievant be brought into the hearing room.

The practice of the parties in the grievance hearings is not altogether clear. It appears that in many cases the grievant is permitted to come into the hearing room, other times he is not given this permission. The grievant was available and could have been brought in. The contract provisions afford the grievant an opportunity for a hearing accompanied by the union's representative. In fact, the grievant was given this opportunity when he made an appointment with Mr. Rhodes but chose to appear without a union representative. Accordingly, it cannot be

said that the provisions of Article IV, Section 5(B) were not complied with by the company. It should be said that the company was ill advised in not permitting the grievant to come into the hearing room during the grievance committee meeting. The denial of such an opportunity would have no effect except to strengthen the employee's conviction that he was being unfairly dealt with.

We come next to the union's contention that the company's failure to state a reasonably specific reason at the time of discharge makes this discharge invalid. Grievant was told by the company that he was discharged as "not suitable for work" and was refused an explanation of what this meant. The union was given the same reason without an explanation. Article IV, Section 1 of the contract sets forth eleven specific grounds for "just cause for discharge." Suitability for work is not listed as one of the grounds for discharge and none of the grounds specified in Section 1 of Article IV were mentioned by the company. There is considerable merit to the union's argument that the claimed ground, "not suitable for work" is so broad and so lacking in specificity as to be almost devoid of meaning.

The words "not suitable for work" could refer to lack of ability or competency on the part of an employee, to personality or character deficiencies, absenteeism, and to a very wide range of circumstances which would lead to a conclusion that an employee is unable to perform his work or render unsatisfactory service. The contract contemplates a specific ground for discharge. But even if the contract were silent, due process requires that an employee who has been subjected to a discharge should know the basis for the discharge so that he can adequately and intelligently reply to the charge both during the

grievance procedure as well as in arbitration. Specificity is an essential element of due process.

The consequences of the failure of the company to give specific reasons for discharge is pointed up by what transpired in this case. The hearing went on for five separate days. There was a stenographic transcript consisting of 674 pages and a total number of 89 exhibits were introduced. It is clear to the arbitrator that had the company made its charges more specific, the union would have been in a position to know what to defend against and would not have felt compelled to have put in as much evidence as went into this record. The fact is that the record may have been shorter if the company, throughout the presentation of its case, had consistently relied on the specific charges set forth at the outset. Unfortunately, references were made by the company's principal witness to the "entire file" of the employee, giving the impression that the company was relying on matters other than those specified. As it developed, the union and the grievant were able to put in a defense to all the charges which were made. The arbitrator realizes that this involved considerable expense for the union, some of which would have been saved if the company had been more specific in its charges. The fact is, however, that the element of surprise as one factor to be considered was eliminated, although this involved hearings for five days over a substantial period of time. The company's failure to make the charges more specific was a violation of the agreement. But since the grievant was given an opportunity to fully meet the charges, the element of surprise was overcome by delay in the proceedings, this violation of the contract by itself did not render the discharge unjust.

But there is another crucial factor in this case which requires the arbitrator to hold that the discharge in this

case cannot stand. In the brief that the company has filed with the arbitrator it takes the position that it is basing its discharge exclusively on the events of the first week of May. Accordingly, the discharge must be evaluated on this basis. These events took place on three days in the first week, Tuesday, May 3, Wednesday, May 4, and Saturday, May 7, when the grievant caused his cab to be towed into the garage. No purpose would be served by discussing in detail varying versions of what occurred on the three days in question.

The arbitrator is inclined to believe on the record that the company had just cause to complain of the grievant's conduct with reference to at least two of the three incidents in question. But even if we assume that the grievant was wrong on all three occasions and subjected the company to considerable expense and annoyance in having his cab towed in, the discharge cannot stand for a very basic reason. The record is devoid of any evidence to show that the discharge was preceded by any type of a warning given to the employee.

The grievant claims he was not given a warning and there is nothing in the record to show that he was.

The record also shows that it was a normal practice for the company to warn employees before disciplinary action was taken. Whether or not there was such a practice, it is established in the arbitration of discharge cases that prior to the discharging of an employee an opportunity should be given to him to correct his conduct. The principle of corrective discipline is firmly established. It is regarded unjust to impose the extreme penalty of discharge without giving an employee a chance to demonstrate that he can overcome the particular problem involved.

But it is not necessary in this case to rely solely on this established principle. The record shows the company followed a practice of giving warnings to its employees prior to discharge. No reason was offered by the company as to why the grievant was treated different from other employees. There is also an element of condonation that appears in this case arising from the fact that the company failed to take any action against this employee after he had his car towed in twice. This abstention would lead the grievant to believe he could proceed with his course of conduct without fear of punishment. In the arbitrator's opinion, the failure of the company to give a warning to the grievant renders the discharge unjust. No purpose would be served by discussing the voluminous record in this case, with respect to other possible misconduct prior to the first week of May since the company has stated clearly and specifically that it relies solely on the events of that week to support its discharge.

This brings us to the question of what remedies are appropriate in this case. The contract is silent as to what remedies shall be given in the event the arbitrator finds the discharge is unjust. This places the matter of the remedy within the discretion of the arbitrator. Since the discharge was without just cause, it is clear that the grievant is entitled to his back pay up to the time of this award. The problem which has troubled the arbitrator greatly and which presents the most difficulty is whether the grievant should be reinstated in his job.

The problem is posed by actions of the grievant which occurred subsequent to the discharge. Before discussing these actions, reference should be made to an aspect of the record which occupied a good part of the hearing. It is essential to discuss this part of the record since some of the post-discharge actions are of a similar character,

and the arbitrator wishes to make clear the basis for his decision.

During the course of his employment and particularly the last several years, the grievant has been openly critical of the company. He has written letters to the newspapers which were published. He has caused pamphlets to be distributed, many of which have to do with the conditions of the cabs in which the drivers are required to do their work. Although this conduct was not specifically made a basis for the discharge, it is clear from the attitudes of the representatives of the company at the hearing that they regarded the conduct as impermissible. Their position is that the conduct was hurtful of the company and evidenced disloyalty on the part of the employee.

The right of an employee to be critical of his employer (with relation to the conditions of his employment) as part of his constitutional right of free speech has not been the subject of extension discussion or consideration. In this case the employer is engaged in public transportation and is subject to some degree of regulation. It shares with the drivers of the company the responsibility for the safety of its passengers. It also has the responsibility in the maintenance of equipment and in other respects for the safety of its drivers. In matters bearing upon the safety of the public and employees, wide latitude should be given employees to express themselves. Despite the reservations which were evidenced during the hearing by the company representatives, apparently the company accepts this right of an employee since no disciplinary action of any character was taken by the company with relation to the activities of the grievant in criticizing the company. Subsequent to the discharge, the grievant involved himself again in a number of communications. All of these com-

munications but one fall in the same category as the predischarge communications. They include a letter dated May 17, 1966 to Senator Abraham A. Ribicoff (Union Ex. 18) which was widely circulated. In this letter, the grievant refers to his great concern about carbon monoxide poisoning resulting from the location of the air intake vents, and claims that many drivers suffer from carbon monoxide poisoning with residual damage to the brain and other vital organs.

On July 7, 1966, he wrote to the National Labor Relations Board charging collusion between the company and the union, sending copies of the letter to the company (Co. Ex. 12). On November 2, 1966, a similar letter was written to the United States Department of Justice, the Federal Bureau of Investigation and the United States Department of Labor (Co. Ex. 14), and to the four Chicago newspapers, suggesting that proof of collusion between certain officers of the union and the company would be revealed at the arbitration hearing scheduled for November 28, 1966. On July 12, he wrote a letter to the union president, with copies to the company, charging that because the Commissioner had not made a visual examination of the cab bodies, fenders and tires "the health and lives of thousands of DUOC members are being needlessly endangered by high concentrations of carbon monoxide and other noxious gases" and complaining also about the location of fresh air vents and the sub-standard maintenance of the cabs (Co. Ex. 31).

These communications fall within two categories, one relating to the grievant's conviction concerning the hazards growing out of the location of the fresh air intake vents, the second having to do with his apparent conviction that the company and the union were in collusion with each other. The grievant testified at length

as to information which he obtained from published materials with relation to the possibilities of carbon monoxide poisoning. It is unnecessary to this decision for the arbitrator to make a determination on this issue. There is in the record enough to show there is a justifiable basis for the grievant's belief. This is not to say that the arbitrator shares the grievant's belief. The grievant, on the basis of what he has read, believed that what he was saying was the truth. The communications concerning claimed collusion between the union and the company are well within the right of the grievant. It should be said, however, in passing that although the grievant had written to newspapers that proof of such collusion might be forthcoming at the arbitration hearing, no evidence was offered by him or anyone else at the hearing to sustain this claim.

There is one communication which is crucial to the opinion of the arbitrator. This is a letter written on May 19, 1966 to Marsh & McLennan, the insurance carriers for the company (Union Ex. 17). In this letter the grievant lists the location of ten of the garage facilities occupied by the company. He states that these facilities are being operated outside the law and that "fire—health—electrical—boiler and other accident hazards are being brazenly ignored." Copies of this letter were sent by him to the company and to the union.

During his testimony, the grievant was not able to say that he had been in the garages listed in this letter within six months of the time he had written it. He did assert that he had stopped at all but three of the garages listed during the course of his employment and that these garages did not have facilities for exhausting paint spray fumes. He also admitted that he had not inspected the boilers prior to writing the letter. His justification for

writing the letter was that he felt it was his duty as a citizen and that he would have written the letter if he had not been discharged. This letter undoubtedly falls within the ambit of free speech of the grievant, but it is another aspect of the letter which concerns the arbitrator.

The letter was sent to the insurance carrier for the company with whom the grievant had no relations. It could only have one purpose and that would be of causing the insurance carrier to do something about the conditions described in the letter. The insurance carrier had a contractual relationship with the company and because of the risks which it was carrying for the company would clearly be concerned with charges such as that made by the grievant.

The letter reveals a motivation by the grievant which, in the opinion of the arbitrator, disqualifies the grievant as an employee. It is a highly reckless letter. It includes charges about garages which admittedly he never visited. It included specific charges about boilers he had never inspected. It makes charges which relate to current conditions in the garages although it is fairly clear from the record that grievant had never been in most of the garages listed within six months prior to the writing of the letter. It is an intervention and interference with the relational interest of the company in a most irresponsible manner. What the letter betrays is an innate hostility by the grievant against the company. It casts doubt on the good faith of many of the other communications which are in the record.

His conduct casts substantial doubt on the good faith desire of the grievant to become an employee of the company. What is it the grievant wants? Why should

UPREME COURT, U. S.

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FILED
OCT 10 1968
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No. 631

In the
# Supreme Court of the United States
OCTOBER TERM, 1968.

YELLOW CAB COMPANY,
a Maine corporation,

*Petitioner,*

*vs.*

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1968.

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*No.*

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YELLOW CAB COMPANY,
a Maine corporation,

*Petitioner,*

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DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Yellow Cab Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 15, 1968.

### Reference to Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit is attached as Appendix A to this petition.

### Grounds on which Jurisdiction is Invoked

The judgment of the Court below was entered on July 15, 1968 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Should a Federal Court *enforce* an arbitrator's award where the labor contract's terms expressly limiting his jurisdiction were *violated* by the arbitrator's assertion of jurisdiction?
2. Is a Federal Court review of compliance with procedural prerequisites to arbitration possible under Section 301 of the Labor Management Relations Act, 1947 *after* arbitration has taken place?
3. Should a Federal Court *enforce* an arbitrator's award where the award shows the Arbitrator asserted jurisdiction despite the fact that:
   a. The grievance was never reduced to writing as expressly required by the labor contract,
   b. The grievance was not appealed until 84 days after the employer's decision to deny it, despite the labor contract provision that grievances not appealed within 20 days "shall be considered as settled on the basis of the last decision and shall not be subject to further appeal."
   c. The labor contract expressly provided "The jurisdiction and power of the arbitrator shall be strictly limited to the application of the terms and provisions of this Agreement . . ."
4. Does an award of over a year's "back pay" for a period during which the arbitrator expressly ruled the grievant *was not entitled to employment* show sufficient partiality and bias that a court should vacate (or refuse to enforce) the award under the provisions of the U. S. Arbitration Act?

## Statutes Involved

The statutory provisions involved are Section 301 of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. Section 185) and Sections 9 and 10 of the U. S. Arbitration Act (61 Stat. 669, 9 U.S.C., Sections 9 and 10). The text of these statutes is set forth in Appendix C.

## Statement of the Case

This action was brought by Yellow Cab Company's petition to vacate a labor arbitrator's award of back pay to a discharged employee. Relief was requested because the arbitrator exceeded his contractual jurisdiction and authority and the award exhibited evident partiality and bias. On cross-motions for summary judgment the District Court denied petitioner's motion and, granting the prayer of the cross-petition, ordered enforcement of the award. The Court of Appeals affirmed the District Court.

The facts are:

A taxicab driver was discharged when, three times within the course of a single week, he returned his cab to the garage or requested it to be towed in before the end of his shift. He complained of fumes in the three different cabs, but the employer's inspection of and comments of other drivers of the same cabs failed to confirm the presence of any fumes or any defect to which they could be attributed. (App. 15-19, 4)*

Three days after the discharge the union interceded for the discharged driver at a grievance meeting held on May 13. The employer representative said the driver "was fired for being unsuitable for the job and that was

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* References are to the printed appendix, certified by the Clerk of the Court of Appeals as part of the record.

that." During the following 70 days the union made no attempt to communicate with the employer on this matter. Then, at a grievance meeting, the union attempted to reopen the subject, but the employer refused to change its original decision. 84 days after the May 13 meeting the union requested arbitration. (App. 4-5)

No grievance had been put into writing and the appeal was not made within 20 days of the employer's May 13 decision, both of which requirements were specifically set forth in the labor contract (App. 11-12) which also contained a provision stating (App. 13):

> "The jurisdiction and power of the arbitrator shall be strictly limited to the application of the terms and provisions of this Agreement * * * and he shall have no jurisdiction or power to alter or modify, in whole or in part, any provisions of this Agreement."

Nevertheless, the Employer, following the rule indicated in *Local Union No. 51* v. *Illinois Power Co.*, 357 F(2d) 916 (CA 7, 1966); *cert. den.* 385 U.S. 850 (1966), joined in the submission to arbitration, but protested the jurisdiction of the arbitration because the contractual prerequisites to arbitration had not been met. The arbitrator dismissed this contention with the comment that "numerous [unwritten] grievances have been presented by the union . . ." (but with no comment that any such grievances had been arbitrated) and a conclusion that the 20-day period for appeal to arbitration commenced with the union's attempt to reopen the case (70 days after the employer's May 13 decision) because many other discharged employees had been reinstated and "The company may have regarded its [May 13] decision as final. The union apparently did not regard the company's decision as being unsusceptible to change . . ." (App. 24-25)

The arbitrator ruled "the failure of the company to give a warning to the grievant renders the discharge unjust," and "Since the discharge was without just cause, it is clear that the grievant is entitled to his back pay up to the time of this award". (App. 30). The "clarity" of the decision to award back pay was clouded by the further ruling that the grievant, 9 days after his discharge, disqualified himself as an employee (App. 34). "Back Pay" for more than a year following this date was awarded (App. 47).

The District Court refused to review the arbitrator's determination relating to procedural arbitrability, but nevertheless found "that the Arbitrator did not exceed his authority under the collective bargaining agreement and that it does not appear that the Arbitrator in his decision and award was biased or partial to the union." (App. 54)

Even though the arbitrator's ruling on procedural matters dealt with his own jurisdiction and power to rule, the Court of Appeals held that the procedural questions involved the arbitrator's "construction of the contract" which construction should not be overruled by the courts and, further, it did not "find an inconsistency [in the award of back pay] so glaring as to require us to vacate the arbitrator's award." (Appendix A, pages 4a, 5a).

**Basis for Federal Jurisdiction**

Suit was brought in accordance with the Federal Arbitration Act (61 Stat. 669, 9 U.S.C. Sections 9, 10). The District Court derived jurisdiction under Section 301 of the Labor Management Relations Act, 1947, (61 Stat. 156, 29 U.S.C., Section 185).

## REASONS FOR GRANTING THE WRIT

There are three special and important reasons for granting the writ of Certiorari in this case:

1.

There is a conflict between the decision in this case and that of the Second Circuit Court of Appeals in *Torrington Co.* v. *Metal Products Workers Union* where the court stated, "We hold that the question of an arbitrator's authority is subject to judicial review * * *".[1]

2.

*This Court* should settle the current widespread uncertainty concerning the reviewability of an arbitrator's ruling on his own jurisdiction and power. *This Court's* statement that "When the arbitrator's words manifest an infidelity to this obligation [to interpret and apply the collective bargaining agreement] courts have no choice but to refuse enforcement of the award"[2] is at the root of the uncertainty and should be clarified.

3.

This Court should exercise its power of supervision to prevent enforcement by the lower courts of an arbitrator's award wherein the specific provisions of a contract are violated by the arbitrator's exercise of jurisdiction.

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[1] 362 F. 2d 677 at p. 680 (CA 2, 1966)

[2] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 at p. 597 (1960).

1.

## THE CONFLICT

In the *Torrington*[3] case the arbitrator "implied" a long standing practice not stated in the labor contract and issued an award in accordance with that practice. The court *vacated* the award since the arbitration clause stated that the arbitrator "shall have no power to add to" the contract.

In this case the arbitration clause was almost identical in substance to that in *Torrington.* It stated the arbitrator had no "jurisdiction or power * * * to alter or modify" the provisions of the labor contract. In asserting jurisdiction the arbitrator altered the contract provisions which required that grievances be placed in writing and appealed within 20 days of the Employers' decision. The Court *enforced* the award.

Thus in the Second Circuit the arbitrator is not permitted to *add* a provision to the contract while in the Seventh Circuit he is permitted to *violate* a provision that is already there—and the court will not even review his decision to determine whether or not he committed the violation. A court's power and responsibility to review must be the same in either case since the parties certainly did not agree that the arbitrator's power to *add* is subject to any different standard of review than his power to *alter.*

2.

## THE IMPORTANT FEDERAL QUESTION

Whether or not an arbitrator should, *before arbitration,* be permitted to rule on his own jurisdiction and power has been settled by this Court. In the famous

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[3] 362 F2d 677 at p. 681 (CA 2, 1966)

Steelworkers' trilogy decisions[4] it was established that an arbitrator should so rule "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[5] And in *John Wiley & Sons* v. *Livingston*[6] it was established that procedural questions should be submitted to the arbitrator for his decision.

To justify the effect of these rulings which might result in an erroneous ruling by the arbitrator the Court, with reference to both substantive and procedural questions, indicated that the arbitrator's decision *after it is made* is subject to judicial review. In *Enterprise*[7] the Court said:

> ". . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

And in *Livingston*[8] this Court specifically affirmed the decision of the Second Circuit in which it was stated:

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[4] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[5] *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, at pp. 582-583 (1960)

[6] 376 U.S. 543 (1964)

[7] 363 U.S. 593 at p. 597 (1960)

[8] 376 U.S. 543 (1964)

> "Of course, if the arbitrator . . . should make an award which is completely without root and foundation in the collective bargaining agreement itself, we have no doubt that the courts would have no choice but to refuse enforcement of the award. . . ."[9]

The *Trilogy* decisions created a storm of interest in the field of labor relations. Virtually every leading legal publication has had at least one important article dealing with the meaning of and possible ramifications of the principles there established. And, following 1960, a number of arbitrator's awards have been brought to litigation in suits to vacate or to enforce because of an alleged error in an arbitrator's ruling on his own jurisdiction.[10]

*This Court* has not yet considered such a case.

The instant case presents an ideal vehicle for this Court to settle with finality the reviewability of an arbitrator's ruling on his own jurisdiction. The labor contract provisions are clear, definite, and are identical in substance with those incorporated in thousands of labor contracts. There are no disputed or unique facts which would cloud the decision or limit the universality of its application.

The cross petitions here will permit a decision defining a court's power to vacate or to enforce an award, or to refuse to do either.

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[9] *Livingston* v. *John Wiley & Sons Inc.*, 313 F. 2d 52 at p. 59, footnote 5 (CA 2, 1963)

[10] See cases cited at page 680 in *Torrington Co.* v. *Metal Products Workers Union*, 362 F. 2d 677 (CA 2, 1966). See also: *Humble Oil & Refining Co.* v. *Local Union 866*, 271 F. Supp. 281 (SD NY, 1967); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 275 F.Supp. 776 (E.D. Pa., 1967).

## 3.

## THE NEED FOR THE EXERCISE OF THIS COURT'S POWER

This simple case raises a number of vital matters of policy and law. Among these are the following:

Can the Federal Courts, under Section 301 of the Labor Management Relations Act, 1947[11] deny enforcement of specific provisions of a labor contract? Certainly it is no longer contended that the courts should review the *merits* of an award where the parties themselves have agreed that the arbitrator's award shall be final and binding. However, the provisions dealing with the arbitrators' jurisdiction can be violated *only by him* when he asserts jurisdiction improperly or refuses to interpret and apply only the contract before him. Thus there is *no* remedy for an arbitrator's error in this respect unless the Courts will review this aspect of his decision. Otherwise the stated limitations are reduced from binding contractual commitments to mere directions which the person intended to be controlled may ignore at will.

An arbitrator deciding on his own jurisdiction is subject to a clear conflict of interest. If he accepts jurisdiction, the additional time spent considering the merits of the case will increase his fee. Such a built-in conflict should not be permitted to cloud the arbitration process and diminish the confidence of both unions and employers in using it. The arbitration process has been established as a desirable one for the settlement of industrial disputes. But it is *not* perfect. Paul R. Hayes,[12]

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[11] 61 Stat. 156, 29 USC, Sec. 185. (Appendix C, pp. 8a-9a)

[12] In his *Storrs Lectures on Jurisprudence* at the Yale Law School, 1964, as published in *Labor Arbitration—A Dissenting View* (Yale University Press, 1966)

now a Federal Judge, speaks, from 16 years of experience as an arbitrator, of "rigged awards", incompetent arbitrators, political pressures on arbitrators, and other factors which can undermine the procedure. A policing of the procedure—and only the federal courts can do this—is necessary if bad decisions are to be weeded out and the standards of the process maintained at a respectable level to continue its acceptability as a vehicle for settling industrial disputes.

In this case, the arbitrator awarded back pay for a period of over a year following the date he ruled the grievant was not entitled to employment. Such a ruling offends common sense and rationality. It has been said that the "pragmatic" approach of arbitrators and the exercise by them of flexibility in fashioning remedies[13] is desirable. But what are the outer limits of this philosophy? Since the parties have agreed to submit to arbitration, are they bound by *any* remedy the arbitrator assesses? Surely there are some outer limits to this power. An arbitrator need not state reasons for his decision. When he does, however, and his reasoning clearly offends common sense and acceptable concepts of fairness, the award should not be enforceable.

The Federal Arbitration Act[14] specifically provides the power for a Federal Court to vacate an arbitrator's award where he has exceeded his powers or there is "evident partiality." This Act has not been referred to in the recent decisions concerning *labor* arbitrator's awards. This Court should indicate whether that statute

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[13] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 at p. 597 (1960)

[14] 61 Stat. 669, 9 U.S.C. Section 10(b) (Appendix C, pp. 7a-8a)

is applicable to a suit to vacate a *labor* arbitrator's award as well as the degree of partiality which must be shown in the arbitrator's decision to require such an order.

Further needs for clarification of the law in this area are more extensively stated in a recent article in The Business Lawyer, July 1968, page 1035.

## Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. HAYTHORNE
*Counsel for Petitioner*

Of Counsel:
KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS

# APPENDIX A

## Opinion of the United States Court of Appeals for the Seventh Circuit

July 15, 1968

Before HASTINGS, FAIRCHILD and CUMMINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Yellow Cab Company appeals from a judgment order of the district court entered January 12, 1968 enforcing an arbitration award and denying appellant's motion for summary judgment vacating the award. Appellant, a Maine corporation, operates a fleet of taxicabs in Chicago, Illinois. Appellee union[1] (the union) is the certified collective bargaining agent of appellant's drivers.

On May 10, 1966, appellant discharged Harold Ray, one of its cab drivers, on the ground that he was unsuitable for employment as a driver. The union intervened on Ray's behalf at a grievance meeting on May 13. At that meeting appellant refused to reconsider its discharge of Ray. There was no further communication on the matter between appellant and the union until ten weeks later when the union, at a regular grievance meeting, attempted to discuss the reinstatement of Ray. Appellant refused to discuss the matter. Two weeks later, on August 5, 1966, the union requested arbitration.

At the outset of arbitration proceedings appellant challenged the arbitrability of the dispute, contending the union had not complied with contractual requirements that grievances be submitted in writing and that requests

[1] Democratic Union Organizing Committee, Local 777, S.I.U.N.A., AFL-CIO.

for arbitration be submitted within twenty days after the Company's adverse decision on a grievance.[2]

The arbitrator rejected the first of these contentions on the ground that appellant had not previously enforced the writing requirement, although numerous grievances had been processed. He rejected the second contention on the ground that the twenty-day limitation on requests for arbitration should be measured from the date of the last discussion of Ray's discharge between appellant and the union. The arbitrator construed the arbitration provision of the contract as having the purpose of encouraging voluntary settlement of grievances prior to arbitration. He found that many discharge grievances concerning appellant's drivers had been settled in the course of time by reinstatement and concluded that the purpose of the grievance procedure would be frustrated if the contract were narrowly construed to require resort to arbitration within twenty days of the Company's first denial of a grievance. As he saw it "the issue * * * is whether or not there was a reasonable basis for the union's belief that the grievance was still open for dis-

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[2] ARTICLE IV—SUSPENSION, DISCHARGE AND LAYOFFS—GRIEVANCE PROCEDURE

* * *

(a) A statement in writing by the aggrieved employee of his version of the controversy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance.

* * *

ARTICLE V—ARBITRATION

Section 1—If the parties herein shall be unable to reach a settlement of a grievance, either party may submit the grievance to arbitration by sending to the other party by registered or certified mail within twenty (20) days * * * a notice in writing in which the matter to be arbitrated is clearly set forth.

cussion and possible settlement." He found that there was.

On the merits the arbitrator concluded that Ray's discharge was unjust. He awarded Ray back pay in the amount of $3,033.66. However, he denied reinstatement, finding that a letter which Ray wrote to appellant's insurance carrier following his discharge revealed a motivation that disqualified him as an employee.

Appellant petitioned the district court on May 26, 1967 to vacate the arbitrator's award on grounds that he exceeded his power and displayed evident bias and partiality. The union cross-petitioned for enforcement of the award, and both parties moved for summary judgment. The court, in its memorandum order granting summary judgment for the union, refused to review the arbitrator's determination of the procedural questions and found that the arbitrator neither exceeded his authority nor displayed bias or partiality.

The first question presented by this appeal is whether the arbitrator's decision on questions of procedural arbitrability are subject to judicial review. The Supreme Court has held that disagreements concerning procedural arbitrability should not be considered as separate disputes, but as aspects of the dispute which called the grievance procedure into play and should therefore be left to the arbitrator. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). It cannot be supposed that the courts, recognizing the arbitrator's exclusive authority to determine procedural questions, may upset the arbitrator's determination in a review proceeding, unless it is arbitrary, capricious or not adequately grounded on the applicable collective bargaining agreement. See *Dallas Typographical Union No. 173* v. *A. H. Belo Corp.*, 5 Cir., 372 F.2d 577 (1967).

The arbitrator's resolution of procedural questions is a part of his decision on the merits of the dispute, as the Supreme Court suggested in *Wiley*. As such, it is subject to the limited standard of review annunciated in *United*

*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960):

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 U.S. at 597. *Torrington Co.* v. *Metal Products Workers Union Local 1645*, 2 Cir., 362 F.2d 677 (1966).

The arbitrator's decision, including his resolution of the procedural questions, clearly draws its essence from the contract. Appellant does not suggest that his decision on the merits is not based on the contract. His decision that compliance with the requirement of written grievances had been excused was based on the parties' practical construction of the contract. "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). The arbitrator's decision that the period of limitation for filing arbitration requests runs from the parties' last discussion of the grievance was based on his interpretation of the contract in light of the practice of the shop.

We do not sit to pass upon the arbitrator's construction of contractual provisions. "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers*

v. *Enterprise Wheel & Car Corp., supra* at 599. *Avco Corp.* v. *Mitchell*, 6 Cir., 336 F.2d 289 (1964).

We find nothing in *Torrington Co.* v. *Metal Products Workers Union Local 1645, supra*, that compels us to an opposite conclusion. The court there applied the same standard of review that we apply here, but concluded that the arbitrator's award did not draw its essence from the contract. That award was based on a company policy that had no foundation in the contract. The arbitrator there concluded that the policy was "carried over" when an existing contract was continued with modifications.

Appellant's contention that the arbitrator was biased rests solely on the alleged "outrageous" inconsistency between his award of back pay to Ray and his denial of reinstatement. The Supreme Court has recognized the need for flexibility in arbitration remedies. See *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra.* The contract contains no provision on remedies, leaving the arbitrator free to exercise his discretion. The award of back pay to a wrongfully discharged employee is obviously within the authority of an arbitrator. Arbitration would be meaningless if the arbitrator lacked the authority to redress the economic wrong inflicted on such an employee.

We do not find an inconsistency so glaring as to require us to vacate the arbitrator's award. The letter found to disqualify Ray for employment was written after his wrongful discharge.

The judgment is affirmed.

AFFIRMED.

## APPENDIX B

### Judgment

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Monday, July 15, 1968

Before
Hon. John S. Hastings, Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

YELLOW CAB COMPANY,
Petitioner-Appellant
No. 16688 vs.
DEMOCRATIC UNION ORGANIZING COMMITTEE, LOCAL 777, S.I.U.N.A., AFL-CIO,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

## APPENDIX C

### Statutes Involved

U.S. Arbitration Act, 61 Stat. 669, 9 U.S.C., Sections 9 and 10:

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. July 30, 1947, c. 392. § 1, 61 Stat. 669.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, § 1, 61 Stat. 669.

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Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. Section 185, (Taft-Hartley Act, Section 301):

§ 185. Suits by and against labor organizations.

(a) Venue, amount, and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter

and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction.

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process.

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency.

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. (June 23, 1947, ch. 120, title III, § 301, 61 Stat. 156.)

SUPREME COURT, U. S.

FILED

OCT 10 1968

JOHN F. DAVIS, CLERK

No. 631

In the

# Supreme Court of the United States

OCTOBER TERM, 1968.

YELLOW CAB COMPANY,
a Maine corporation,

*Petitioner,*

*vs.*

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

*Respondent.*

# APPENDIX

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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# APPENDIX

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**Memorandum Order of United States District Court for the Northern District of Illinois, Eastern Division:**

UNITED STATES DISTRICT COURT

* * (Caption—No. 67 C 890) * *

Memorandum Order

This cause is before the court on the plaintiff's petition which seeks to vacate an arbitrator's award and on the cross-petition of defendant which seeks an order of this court confirming or enforcing that award. Each party has

made a motion for summary judgment and the court, having examined and considered the said motions, together with the pleadings herein, the briefs submitted by counsel and the supporting affidavit submitted by defendant, finds that there is involved here no genuine issue as to any material fact.

The court further finds that the Arbitrator did not exceed his authority under the collective bargaining agreement and that it does not appear that the Arbitrator in his decision and award was biased or partial to the union.

Petitioner contends, in the instant proceeding, that there was a failure to comply with certain contractual provisions relating to procedural steps to be taken in the matter of grievances and their submission to arbitration. This contention was also raised before the Arbitrator who considered and ruled upon it, holding that the procedural requirements had been met. This court will not review that determination. The United States Court of Appeals for the Seventh Circuit in Local Union No. 51, International Brotherhood of Electrical Workers, AFL-CIO vs. Illinois Power Co., 357 F.2d 916 (which cites John Wiley & Sons vs. Livingston, 376 U.S. 543) has held that it is for the Arbitrator to determine procedural questions which grow out of the dispute and bear on its final disposition.

The court is of the view that the contentions made by defendant cross-petitioner in support of its motion for summary judgment should be sustained.

It is Ordered, Adjudged and Decreed that—

(1) The motion made by defendant cross-petitioner, Democratic Union Organizing Committee Local 777 S.I.U.N.A., AFL-CIO, for summary judgment in its favor,

dismissing Petitioner's petition and confirming and enforcing the decision and award of the Arbitrator be and it hereby is granted.

(2) The motion made by petitioner cross-defendant, Yellow Cab Company, for summary judgment in its favor be and it hereby is denied.

(3) Each of the parties will pay its own costs.

Enter:

/s/ J. S. Perry
Judge

Dated: Chicago, Illinois
January 12, 1968.

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**Decision and award of Arbitrator:**

American Arbitration Association, Administrator

| | |
|---|---|
| In the matter of the Arbitration between YELLOW CAB COMPANY and DUOC, LOCAL 777, TS&AW, SIUNA, AFL-CIO. | No. 51 30 0202 66 |

Decision and Award of Arbitrator

Pursuant to the collective bargaining agreement between the parties and pursuant to the procedures of the American Arbitration Association, the undersigned was designated arbitrator to hear a grievance between the Yellow Cab Company, sometimes hereinafter referred to as the company, and the Union involving the discharge of Harold Ray, sometimes hereinafter referred to as grievant. The hearings were held at the offices of the American Arbitration Association, Chicago, Illinois, on November 28, and December 15, 19, and 20, 1966, and on January 5, 1967. The appearances were:

Kirkland, Ellis, Hodson, Chaffetz & Masters
by Emil F. Meier
appeared on behalf of the company,
Katz & Friedman
by Irving M. Friedman
appeared on behalf of the union.

The arbitrator was supplied with a stenographic transcript consisting of 674 pages and a total number of 89 exhibits were introduced, 48 by the company, 40 by the union, and one joint exhibit. Post-hearing briefs were filed by the parties and were received by the arbitrator on or about February 7.

## Background Facts

On May 10, 1966, grievant was discharged from his position as a cab driver for the company because he was "not suitable for the work" (42). Grievant had been an employee of the company for three months in 1926, for two years between 1942 and 1944, for three months in 1960, and from March, 1962 until his discharge in May, 1966 (R 43). A. H. Rhodes, the General Manager, made the decision to discharge grievant (41). The reason for his decision was that grievant had had his cab towed in on May 3 and May 7, 1966, and that the company thought that the towing on those occasions had been unnecessary (44).

There were three incidents between May 3, 1966 and May 7, 1966, which were out of the ordinary. Each of the three involved a different cab, and the relevant facts of each will be set out separately below.

On May 3, 1966, grievant became ill while driving his cab. He testified the cause of this illness to be fumes entering the cab (339-40). He called for a tow truck and had

the cab towed into the garage (341). On May 4, 1966, the cab was tested for fumes by two members of the garage personnel, a mechanic and the assistant supervisor (131). They rode for approximately 7 miles at speeds ranging from 10 to 60 miles per hour (90). They detected no fumes (91, 121). No test utilizing any equipment especially designed to detect fumes was conducted (104). There was a conflict in testimony as to whether leaks in an exhaust system always make some noise audible over ordinary motor noises (93-4, 431). The daytime driver of the cab testified that he had never had trouble with fumes in the cab, and more particularly, that he had not had trouble with fumes in the cab during the first week in May, 1966 (133, 142). A previous daytime driver of the cab testified that he had never had trouble with fumes in the cab and that grievant was constantly complaining about non-existant difficulties with the cab (616, 622-3).

On May 4, 1966, grievant was issued a different cab. He drove the cab back to the garage after only four trips and three hours (351, Co. Ex. 4). He stated at the hearing that he had again become ill while driving from fumes (351). When he returned the cab to the garage, however, he refused to state any grounds for his action (352-3). He stated that he had been unable to shut off the air intake system in the cab (350). The regular driver of this cab testified that he had not had any trouble with the cab either before or after May 4, 1966 (581). His meter envelopes showed that he had worked full days with this cab both immediately preceding and immediately following the day grievant had the cab (Co. Exs. 36-40). The written statement grievant gave the company to explain his actions on the day in question did not mention fumes or any other trouble with the cab (Co. Exs. 5 and 6).

A considerable amount of evidence relating to the heating and ventilating system on the cars used by the company was introduced. These automobiles have the intakes for the heating and ventilating system directly under the headlights at the front end of the cab (100). Exhibits were presented which tend to show that the exhaust from any vehicle in front of a cab will enter the air intake system directly (Union Exs. 23-33). Other evidence was introduced which tends to show that many automobile manufacturers place air intakes at the base of the windshield where they are more removed from the source of exhaust fumes on the cars ahead (Union Exs. 34-36).

Grievant testified that it was not unusual for a cab to wait for up to two hours in the cab line at O'Hare International Airport (409). A driver for the Checker Cab Co. —which uses cars similar to those used by the company— testified that on one occasion he was rendered unconscious while waiting in the cab line at O'Hare (559). He said he observed two drivers for the company who also appeared to be unconscious (558-9). All three had been in the cab line for over an hour (560, 563). He was told at the time that he had been overcome by exhaust fumes (561). A mechanic for the company testified that if the air intake was jammed open, exhaust fumes from the vehicle ahead would enter the cab (428).

Grievant had a third cab towed in on May 7, 1966. He was on his first run, and the cab kept dying (358). The tow truck driver could find nothing wrong with the cab, and told grievant to drive it in (358, 145-6). Grievant refused, stating that besides the motor dying there were several other specific defects in the cab, including sulphuric acid fumes in the passenger compartment (358-9) These fumes were from the battery in the trunk (361). He told the driver he considered the cab a safety hazard

(359). Upon his return to the garage, grievant was told he could not have another cab until he had talked with the General Manager of the Company, Mr. A. H. Rhodes, on the following Monday, May 9, 1966. Grievant went to see Mr. Rhodes on May 10, 1966, after having made an appointment, and was told that he was discharged because he was "not suitable for the work."

A mechanic testified that he had put a new battery and alternator into the cab on the morning of the seventh, and that they had tested out perfectly (92-3). Another mechanic testified that there is no wall between the passenger compartment and the trunk where the battery is located (413). During the two years that this witness had driven for the company, he had often had trouble with battery fumes (418). Other drivers often complain about acid fumes (419). The regular driver of the cab testified that he often had trouble with the cab, on the average of once a week (181-2). He had noticed acid fumes in the cab on several occasions during the week preceding May 7, 1966, and had reported the trouble (191-2). The mechanic who inspected the cab after it was towed in testified that it seemed to run well, and that he did not notice any acid fumes (165-6). This witness, however, admitted that he did not particularly like the grievant, (167) and that he knew grievant was in trouble with the company when he made his inspection (172). The cab was removed from service by accident within a month of the occasion in question (630-1), and although it would have required only two hours work to return it to service, the company did not do so (637).

Although these three occasions were given by the company as the basis for the discharge, there was another previous occasion where grievant had noticed fumes in his cab which should be noted. On March 27, 1966, grievant

noticed fumes in his cab while driving from O'Hare airport (330). He became too sick to drive, so he called a tow truck and had his cab towed into the garage (331). Grievant then went to Weiss Memorial hospital (332). The doctor there told him that he did not have the facilities to run a carbon monoxide test, anad that grievant would have to go to Wesley Memorial Hospital to get one (332-3). Grievant requested that the Safety Department of the company provide him transportation to Wesley. There was a misunderstanding between the Safety Supervisor and grievant, resulting in the Safety Supervisor's leaving grievant at Weiss (334-4, 603-7). Grievant went home (334). He was off work for a week or ten days (335). He filled out a statement relating to the incident for the company in which he said that he suffered some loss of memory (336, Union Ex. 11). The company tried to persuade him to remove that statement, but grievant refused (337-8).

The mechanic who fixed the cab testified that he had replaced the entire exhaust system because a piece of the tail pipe had broken off (558). This was the same cab grievant had on May 3, 1966. Grievant appears to be quite concerned about carbon monoxide poisoning, and has collected a considerable amount of literature relating to it (344). Some of this literature was admitted into evidence (Union Exs. 12-13).

Grievant conducted several campaigns while he was employed by the company. In 1964, he ran for president of the union (374-5). He had also conducted one-man campaigns relating to wages and safety conditions in garages and cabs (375-6). During the course of these various campaigns, grievant has made critical and derogatory remarks about both the company and the union leadership. These statements were made in open letters to the drivers,

handbills, and articles and letters to the editor in Chicago newspapers (Union Exs. 14-18). On several occasions, grievant publicly accused the company of sending drivers out with cabs which accumulated so much carbon monoxide that they were "mobile gas chambers." (Union Ex. 18.) Mr. A. H. Rhodes, the man who decided to fire grievant, said that he was aware of grievant's activities and that many of grievant's public statements were in the file he considered before he decided to discharge grievant (46-7, 216-21).

The company presented evidence that the grievant desired to be discharged. One company witness said grievant on several occasions asked him what he had to do to get fired (251-2). Grievant told him that he wanted to be fired so he could get unemployment insurance for 26 weeks, and then he would be 62 and could go on social security (253). This was denied by grievant (368). He claimed that he never made any statement of this nature. The company witness testified that these conversations were in March or February, 1966. However, grievant was 62 in December, 1965 (327). Another company witness asserted that he overheard the conversation testified to by the first witness, and that the conversation was as he testified (618, 621).

Although it was usual company policy to warn a driver before discharge (225), grievant was not warned (225-6, 361). The company did not explain why. Employees who have been discharged are often rehired (229). Some have been discharged and rehired more than once (232). Some who were discharged for stealing from the company has been rehired (235-6). The union and the company meet nearly every Friday to discuss reinstatement of discharged men. Many men regain their jobs as a result of

these meetings even though they were discharged for stealing or drinking on the job (230, Union Ex. 10).

The grievant was not allowed into the meetings regarding his grievance even though the union so requested (285-6, 296). The company nearly always grants a request of this nature (291, 308). The company refused to be specific about the reasons for grievant's discharge (285-6, 296), and two company representatives made remarks about what a gadfly grievant was and that the company would rehire him if the union would shut him up (305).

The company asserted that grievant's actions since his discharge indicate that he did not want to be rehired. On May 17, grievant wrote to Senator Abraham A. Ribicoff complaining about the alleged unsafety of the air intake system on the company's cars (Union Ex. 18). On May 19, 1966, grievant wrote to the company's insurance carrier about alleged unsafe conditions in specified company garages (Union Ex. 17). In the May 19 letter, grievant alleged that the boilers in these garages were unsafe. However, grievant admitted that he had not inspected the boilers prior to writing the letter (516-9). He asserted that he had stopped at all but three of the garages on the list during the course of his employment (526), and that these garages did not have facilities for exhausting paint spray fumes, another alleged unsafe condition (527). He stated that he wrote the letter because he felt it was his duty as a citizen and that he would have written it if he had not been discharged (532-3). He did not know whether or not he had been in the garages listed in the letter of May 19 within six months of the time he wrote it (534).

Finally, grievant asserted that he could not get necessary repairs made on his cab (373, 451). This assertion

was denied by the garage manager (634). Grievant asserted that at one point he had been forced to go to a company official at the main office to get necessary repair work done (369-70, 373).

Relevant Contract Provision

The relevant contract provisions read as follows:

"Article IV—Suspension, Discharge and Layoffs—Grievance Procedure.

"Section 1—Without limiting, in any way, the grounds of just cause for discharge, the Company shall have the right to suspend or discharge any chauffeur guilty of the following offenses:

(1) Use of intoxicants while on duty;
(2) Dishonesty;
(3) Gross carelessness in operation of cab;
(4) Discourtesy to patrons;
(5) Failure to report an accident;
(6) Having an accident involving serious personal injury caused by his negligence;
(7) Excessive accident frequency;
(8) Consistent low bookings;
(9) Excessive unpaid mileage;
(10) Excessive gasoline consumption;
(11) Habitual irregularity of attendance or failure to observe written Company rules.

• • •

"Section 5—Any other grievances including those involving the suspension or discharge of an employee shall be submitted by the Union directly to the Company's representative at the Central Office, as provided in Step 2 of the grievance procedure.

(A) A statement in writing signed by the aggrieved employee of his version of the contro-

versy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance.

(B) Any employee who has been suspended or discharged shall be afforded the opportunity of a hearing, accompanied by the Union's representative before the representative of the Company.

"Section 6—Any grievance which is not appealed in writing from one step of this grievance procedure to the next step within ten (10) days after such decision shall be considered as settled on the basis of the last decision and shall not be subject to further appeal, provided, however, that in the case of grievances which may be referred to arbitration, the time for appeal shall be twenty (20) days rather than ten (10) days."

Discussion

One preliminary matter should be dealt with. Some of the evidence presented at the hearing indicated that the grievant believes, or at least at one time believed, that his discharge was the result of collusion between the company and the union (CF: Co. Exs. 11 and 11A). At the conclusion of the hearing the grievant stated that he would not offer any evidence of such collusion (655). He also stated that he had been given a full and fair hearing of the grievance (656). The arbitrator regards the charge of collusion as withdrawn and will accordingly make no decision regarding the matter.

At the outset of the case the company has challenged the right of the claimant to arbitration on the ground that

he has failed to comply with the requirements of Section 5(A) of Article IV which reads as follows:

> "(A) A statement in writing signed by the aggrieved employee of his version of the controversy which led to his suspension or discharge shall be submitted to the representative of the Company, together with the written statement of the grievance."

The company concedes that written grievances and statements have not been previously required and that numerous grievances have been presented by the union both before and after Ray's discharge, which were not reduced to writing. The company also relies on Article V, Section 1, which reads as follows:

> "Section 1—If the parties herein shall be unable to reach a settlement of a grievance, either party may submit the grievance to arbitration by sending to the other party by registered or certified mail within twenty (20) days, or within the additional period of ten (10) days, as extended by written agreement of the parties, after the decision of the representative of the Company, a notice in writing in which the matter to be arbitrated is clearly set forth."

It contends that the company representative gave the decision of the company on May 13, and no request was made for arbitration until August 5, 1966, despite the fact that the grievance was in the hands of the union attorneys as early as May 20. June 2 it claims was the last day on which the case could be taken to arbitration.

It appears clear from the provisions of Article V that the purposes of the procedure established is to encourage the settling of grievances between the parties prior to the time they are taken to arbitration. The record shows

numerous grievances settled by the parties including many discharges which were reduced to reinstatements. Although the company on May 13, 1966 rejected the grievance, there is nothing in the record to suggest that this of itself terminated the possibilities of the parties' reaching a settlement of the grievance. The company may have regarded its decision as final. The union apparently did not regard the company's decision as being unsusceptible to change and accordingly reopened the grievance for reconsideration on a later date. The purposes of the grievance procedure would be frustrated if the provisions of the agreement are narrowly construed to require that arbitration must be resorted to when the company first denies grievances. Experience dictates that what is apparently a firm position may yield to change or compromise in the course of time and in the course of discussions.

The issue as the arbitrator sees it is whether or not there was a reasonable basis for the union's belief that the grievance was still open for discussion and possible settlement. The arbitrator cannot say on the face of the record that there was no basis for this belief. Accordingly it is the arbitrator's opinion that the twenty day period within which arbitration is to be requested should be measured from the last discussion of the matter between the union and the company. Arbitration in this case was requested within the twenty-day period and there is therefore no substantial basis for the company's claim that the contract provisions had not been complied with.

We next come to the claim of the union that the grievant was denied his opportunity for a fair hearing under provisions of Article IV, Section 5(B), which reads:

> "(B) Any employee who has been suspended or discharged shall be afforded the opportunity of a

hearing, accompanied by the Union's representative before the representative of the Company."

The grievant was suspended on May 7 and was told to see Mr. Rhodes on the following Monday, May 9. On that day he called Rhodes and asked if he could bring someone from the union with him. Rhodes agreed to this. Later the grievant called Rhodes to say he could not get anyone from the union and it was then agreed that, at the grievant's request, he would come in the next day.

After being kept waiting for some period of time, the grievant was seen by Mr. Rhodes. He came in without a union representative. He was told he was discharged because he was unsuitable for the work. At this point, the grievant testified "with that I left." There is nothing in the record to indicate that Ray was not permitted to make any presentation that he wished to make and he did not in fact offer any facts or arguments bearing upon the discipline imposed against him. On the following Friday, the regular weekly grievance meeting took place. The Ray case was one of the cases considered. No arguments were advanced by the union committee except that a request was made that the grievant be brought into the hearing room.

The practice of the parties in the grievance hearings is not altogether clear. It appears that in many cases the grievant is permitted to come into the hearing room, other times he is not given this permission. The grievant was available and could have been brought in. The contract provisions afford the grievant an opportunity for a hearing accompanied by the union's representative. In fact, the grievant was given this opportunity when he made an appointment with Mr. Rhodes but chose to appear without a union representative. Accordingly, it cannot be

said that the provisions of Article IV, Section 5(B) were not complied with by the company. It should be said that the company was ill advised in not permitting the grievant to come into the hearing room during the grievance committee meeting. The denial of such an opportunity would have no effect except to strengthen the employee's conviction that he was being unfairly dealt with.

We come next to the union's contention that the company's failure to state a reasonably specific reason at the time of discharge makes this discharge invalid. Grievant was told by the company that he was discharged as "not suitable for work" and was refused an explanation of what this meant. The union was given the same reason without an explanation. Article IV, Section 1 of the contract sets forth eleven specific grounds for "just cause for discharge." Suitability for work is not listed as one of the grounds for discharge and none of the grounds specified in Section 1 of Article IV were mentioned by the company. There is considerable merit to the union's argument that the claimed ground, "not suitable for work" is so broad and so lacking in specificity as to be almost devoid of meaning.

The words "not suitable for work" could refer to lack of ability or competency on the part of an employee, to personality or character deficiencies, absenteeism, and to a very wide range of circumstances which would lead to a conclusion that an employee is unable to perform his work or render unsatisfactory service. The contract contemplates a specific ground for discharge. But even if the contract were silent, due process requires that an employee who has been subjected to a discharge should know the basis for the discharge so that he can adequately and intelligently reply to the charge both during the

grievance procedure as well as in arbitration. Specificity is an essential element of due process.

The consequences of the failure of the company to give specific reasons for discharge is pointed up by what transpired in this case. The hearing went on for five separate days. There was a stenographic transcript consisting of 674 pages and a total number of 89 exhibits were introduced. It is clear to the arbitrator that had the company made its charges more specific, the union would have been in a position to know what to defend against and would not have felt compelled to have put in as much evidence as went into this record. The fact is that the record may have been shorter if the company, throughout the presentation of its case, had consistently relied on the specific charges set forth at the outset. Unfortunately, references were made by the company's principal witness to the "entire file" of the employee, giving the impression that the company was relying on matters other than those specified. As it developed, the union and the grievant were able to put in a defense to all the charges which were made. The arbitrator realizes that this involved considerable expense for the union, some of which would have been saved if the company had been more specific in its charges. The fact is, however, that the element of surprise as one factor to be considered was eliminated, although this involved hearings for five days over a substantial period of time. The company's failure to make the charges more specific was a violation of the agreement. But since the grievant was given an opportunity to fully meet the charges, the element of surprise was overcome by delay in the proceedings, this violation of the contract by itself did not render the discharge unjust.

But there is another crucial factor in this case which requires the arbitrator to hold that the discharge in this

case cannot stand. In the brief that the company has filed with the arbitrator it takes the position that it is basing its discharge exclusively on the events of the first week of May. Accordingly, the discharge must be evaluated on this basis. These events took place on three days in the first week, Tuesday, May 3, Wednesday, May 4, and Saturday, May 7, when the grievant caused his cab to be towed into the garage. No purpose would be served by discussing in detail varying versions of what occurred on the three days in question.

The arbitrator is inclined to believe on the record that the company had just cause to complain of the grievant's conduct with reference to at least two of the three incidents in question. But even if we assume that the grievant was wrong on all three occasions and subjected the company to considerable expense and annoyance in having his cab towed in, the discharge cannot stand for a very basic reason. The record is devoid of any evidence to show that the discharge was preceded by any type of a warning given to the employee.

The grievant claims he was not given a warning and there is nothing in the record to show that he was.

The record also shows that it was a normal practice for the company to warn employees before disciplinary action was taken. Whether or not there was such a practice, it is established in the arbitration of discharge cases that prior to the discharging of an employee an opportunity should be given to him to correct his conduct. The principle of corrective discipline is firmly established. It is regarded unjust to impose the extreme penalty of discharge without giving an employee a chance to demonstrate that he can overcome the particular problem involved.

But it is not necessary in this case to rely solely on this established principle. The record shows the company followed a practice of giving warnings to its employees prior to discharge. No reason was offered by the company as to why the grievant was treated different from other employees. There is also an element of condonation that appears in this case arising from the fact that the company failed to take any action against this employee after he had his car towed in twice. This abstention would lead the grievant to believe he could proceed with his course of conduct without fear of punishment. In the arbitrator's opinion, the failure of the company to give a warning to the grievant renders the discharge unjust. No purpose would be served by discussing the voluminous record in this case, with respect to other possible misconduct prior to the first week of May since the company has stated clearly and specifically that it relies solely on the events of that week to support its discharge.

This brings us to the question of what remedies are appropriate in this case. The contract is silent as to what remedies shall be given in the event the arbitrator finds the discharge is unjust. This places the matter of the remedy within the discretion of the arbitrator. Since the discharge was without just cause, it is clear that the grievant is entitled to his back pay up to the time of this award. The problem which has troubled the arbitrator greatly and which presents the most difficulty is whether the grievant should be reinstated in his job.

The problem is posed by actions of the grievant which occurred subsequent to the discharge. Before discussing these actions, reference should be made to an aspect of the record which occupied a good part of the hearing. It is essential to discuss this part of the record since some of the post-discharge actions are of a similar character,

and the arbitrator wishes to make clear the basis for his decision.

During the course of his employment and particularly the last several years, the grievant has been openly critical of the company. He has written letters to the newspapers which were published. He has caused pamphlets to be distributed, many of which have to do with the conditions of the cabs in which the drivers are required to do their work. Although this conduct was not specifically made a basis for the discharge, it is clear from the attitudes of the representatives of the company at the hearing that they regarded the conduct as impermissible. Their position is that the conduct was hurtful of the company and evidenced disloyalty on the part of the employee.

The right of an employee to be critical of his employer (with relation to the conditions of his employment) as part of his constitutional right of free speech has not been the subject of extension discussion or consideration. In this case the employer is engaged in public transportation and is subject to some degree of regulation. It shares with the drivers of the company the responsibility for the safety of its passengers. It also has the responsibility in the maintenance of equipment and in other respects for the safety of its drivers. In matters bearing upon the safety of the public and employees, wide latitude should be given employees to express themselves. Despite the reservations which were evidenced during the hearing by the company representatives, apparently the company accepts this right of an employee since no disciplinary action of any character was taken by the company with relation to the activities of the grievant in criticizing the company. Subsequent to the discharge, the grievant involved himself again in a number of communications. All of these com-

munications but one fall in the same category as the predischarge communications. They include a letter dated May 17, 1966 to Senator Abraham A. Ribicoff (Union Ex. 18) which was widely circulated. In this letter, the grievant refers to his great concern about carbon monoxide poisoning resulting from the location of the air intake vents, and claims that many drivers suffer from carbon monoxide poisoning with residual damage to the brain and other vital organs.

On July 7, 1966, he wrote to the National Labor Relations Board charging collusion between the company and the union, sending copies of the letter to the company (Co. Ex. 12). On November 2, 1966, a similar letter was written to the United States Department of Justice, the Federal Bureau of Investigation and the United States Department of Labor (Co. Ex. 14), and to the four Chicago newspapers, suggesting that proof of collusion between certain officers of the union and the company would be revealed at the arbitration hearing scheduled for November 28, 1966. On July 12, he wrote a letter to the union president, with copies to the company, charging that because the Commissioner had not made a visual examination of the cab bodies, fenders and tires "the health and lives of thousands of DUOC members are being needlessly endangered by high concentrations of carbon monoxide and other noxious gases" and complaining also about the location of fresh air vents and the sub-standard maintenance of the cabs (Co. Ex. 31).

These communications fall within two categories, one relating to the grievant's conviction concerning the hazards growing out of the location of the fresh air intake vents, the second having to do with his apparent conviction that the company and the union were in collusion with each other. The grievant testified at length

as to information which he obtained from published materials with relation to the possibilities of carbon monoxide poisoning. It is unnecessary to this decision for the arbitrator to make a determination on this issue. There is in the record enough to show there is a justifiable basis for the grievant's belief. This is not to say that the arbitrator shares the grievant's belief. The grievant, on the basis of what he has read, believed that what he was saying was the truth. The communications concerning claimed collusion between the union and the company are well within the right of the grievant. It should be said, however, in passing that although the grievant had written to newspapers that proof of such collusion might be forthcoming at the arbitration hearing, no evidence was offered by him or anyone else at the hearing to sustain this claim.

There is one communication which is crucial to the opinion of the arbitrator. This is a letter written on May 19, 1966 to Marsh & McLennan, the insurance carriers for the company (Union Ex. 17). In this letter the grievant lists the location of ten of the garage facilities occupied by the company. He states that these facilities are being operated outside the law and that "fire—health—electrical—boiler and other accident hazards are being brazenly ignored." Copies of this letter were sent by him to the company and to the union.

During his testimony, the grievant was not able to say that he had been in the garages listed in this letter within six months of the time he had written it. He did assert that he had stopped at all but three of the garages listed during the course of his employment and that these garages did not have facilities for exhausting paint spray fumes. He also admitted that he had not inspected the boilers prior to writing the letter. His justification for

writing the letter was that he felt it was his duty as a citizen and that he would have written the letter if he had not been discharged. This letter undoubtedly falls within the ambit of free speech of the grievant, but it is another aspect of the letter which concerns the arbitrator.

The letter was sent to the insurance carrier for the company with whom the grievant had no relations. It could only have one purpose and that would be of causing the insurance carrier to do something about the conditions described in the letter. The insurance carrier had a contractual relationship with the company and because of the risks which it was carrying for the company would clearly be concerned with charges such as that made by the grievant.

The letter reveals a motivation by the grievant which, in the opinion of the arbitrator, disqualifies the grievant as an employee. It is a highly reckless letter. It includes charges about garages which admittedly he never visited. It included specific charges about boilers he had never inspected. It makes charges which relate to current conditions in the garages although it is fairly clear from the record that grievant had never been in most of the garages listed within six months prior to the writing of the letter. It is an intervention and interference with the relational interest of the company in a most irresponsible manner. What the letter betrays is an innate hostility by the grievant against the company. It casts doubt on the good faith of many of the other communications which are in the record.

His conduct casts substantial doubt on the good faith desire of the grievant to become an employee of the company. What is it the grievant wants? Why should

he go back on a job in which he is compelled to operate equipment which he regards as hazardous to his health and his passengers? Why should he work for a company which he claims is in violation of the law in the maintenance of its facilities and equipment?

One gains the impression that his sole purpose in seeking reinstatement is so that he can continue the campaign against the company as an employee of the company. But all of this is speculation with relation to the grievant's motivation. The arbitrator must be guided by the objective facts and these facts establish that the grievant has a strongly entrenched antagonism to the company, so deep that he was willing to make shotgun charges against the company without adequate foundation.

The issue as to the grievant's reinstatement, put in the simplest terms, is whether an employee should be reinstated to a job and restored to the relationship of an employee of the company when he has demonstrated a deep animosity against the employer and a hostility so great as to result in the making of unfounded and perhaps hurtful charges against the employer.

The underlying question is what standard of conduct should an employee be held to with respect to statements or utterances about his employer made publicly or made to others than his employer or other employees. The answer to this question will turn in part on the degree of loyalty which an employer may reasonably expect from an employee. Admittedly this test is difficult to define. The use of the word "loyalty," as such, can be treacherous as we know from the misuse of the term during the McCarthy period. What can be said here, unfortunately, must be expressed in negative terms. The

arbitrator believes it will be generally agreed that an employee may not make irresponsible and unfounded statements to persons or firms with whom the employer has relational interests which may be hurtful to an employer. The least that it can say is that if the employer-employee relationship does not require some degree of loyalty on the part of the employee, it cannot tolerate intense and open hostile opposition.

There must be a balancing of interest of both the employer and the employees. The opinion of the arbitrator is that it would be unjust to saddle the company with an employee who has privately and publicly, in a notorious way, made clear his disaffection and animosity for the company.

The union places great emphasis on the grievant's role as a necessary voice of dissent for the union members. The reinstatement of the grievant is not essential to protect the right of the employees to protest against unsafe working conditions, individually or through the union. The employees have a right to dissent and to express their dissent and to let the employer know when conditions are unsafe. The union has a similar right. There should be no conflict between these essential rights and the right of the company not to be required to reinstate an employee who so patently evidences his anger and his great dislike for the company. The grievant is free to continue his campaign against the company. He does not have the right to a job so that he can mount this campaign more effectively. No historic rights are infringed by a denial to reinstate the grievant. Nor does justice require reinstatement. On the contrary, it is because of the arbitrator's conviction that reinstatement would be unjust, that reinstatement is denied.

Award

The grievance is sustained in part and denied in part. The company will reimburse the grievant for all time lost from the date of his discharge to the date of this award including vacation and holiday pay. The employee's request for reinstatement is denied.

The arbitrator reserves jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of back pay for the grievant.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 28th day of February, 1967.

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**Supplemental Decision and Award of Arbitrator:**

AMERICAN ARBRITRATION ASSOCIATION, ADMINISTRATOR

* * (Caption—No. 51 30 0202 66) * *

Supplemental Decision And
Award Of Arbitrator

The award of the arbitrator dated February 28, 1967 reserved jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of compensation to be paid to the grievant under the terms of the award. On March 29, 1967 the arbitrator was informed that the parties were in dispute concerning such compensation. In view of the necessity of holding a hearing in the matter, an order was entered on that date by the arbitrator extending the period within which the arbitrator reserved jurisdiction to resolve the issue of backpay for a period of sixty days. The hearing was held on two days—February 28, 1967 and May 24,

1967. On May 25, 1967 the arbitrator entered an order reserving jurisdiction to resolve the issue of backpay for an additional period of thirty days from that date to provide time for the arbitrator to consider the record and issue his supplemental award. On the record the parties agreed to the extension of time. The company, however, made clear that in doing so it did not waive any claims it might have as to the award of February 28, 1967. Copies of the several extension orders are attached hereto.

The parties were represented by their counsel at both hearings. The testimony of the grievant and Mr. Arthur Billups, chief steward for the union was offered on behalf of the union. Mr. Alfred H. Rhodes testified for the company. A stenographer's transcript was supplied to the arbitrator by the parties.

The award of February 28, 1967 directed the company to "reimburse the grievant for all time lost from the date of his discharge to the date of this award including vacation and holiday pay." The contract makes no provision for holiday pay. Accordingly, the issues before the arbitrator are the computation of wages due to lost time and whether the grievant is qualified to receive vacation pay under the terms of the agreement. These will be taken up in turn.

1. Wages for Time Lost

The employee was out of work for a period of forty-two weeks from the date of this discharge to the date of the award. During this period the grievant had no earnings from outside employment. He attempted to secure other employment without success. He did receive unemployment compensation for approximately ten weeks during the period but no provision relative to the benefits

received are necessary in this supplemental award. Under the Illinois Unemployment Compensation Act (Ill. Rev. Stat., Ch. 48, Para. 490) the grievant is obliged to reimburse the State for benefits received.

The grievant claims wages due to time lost to him should be computed on the basis of $17.50 a day. This claim is based on Article III, Section 2 of the parties' collective agreement which reads as follows:

> "Section 2—The company will guarantee to furnish a cab to each driver for operation for his regular shift, and also guarantee him against breakdown. If the driver appears for work at his regular appointed time and no operable cab is available for his shift and the Company is unable to supply such operable cab for the remainder of the day, the Company will pay such driver, as compensation for that day's work the sum of Seventeen Dollars and Fifty Cents ($17.50). If, however, the Company assigns a cab to the driver sometime during that day, then the company will pay the driver for each hour that he was compelled to wait the sum of One Dollar and Seventy-five Cents (1.75). In the event the driver has a breakdown on the road, through no fault of his own, and the Company is unable to furnish the driver with another operable cab, the Company will pay the driver as compensation at One Dollar and Seventy-five Cents (1.75) per hour on an hourly basis for the balance of his shift or until such time as another operable cab can be furnished him."

The foregoing provision is basically a call-in pay provision which guarantees to an employee minimum compensation if he reports to work and the company is unable to supply him with an operable cab. There is no

language in the provision to justify the inference that the standard therein established of $17.50 per day should apply in the case of an employee to whom an award is made for unjust discharge. Moreover, the call-in pay provision requires the employee to be at his place of employment ready for work. Call-in pay compensates him not only for failure to offer him work but for the expense and time required to go to and from the company's premises. The use of the call-in pay provision would eliminate all differences between cab drivers in terms of their earning capacity. All cab drivers would be treated equally even though some by reason of their knowledge and diligence are able regularly to earn more commissions than their fellow employees. Applying the arbitrary amount fixed for call-in pay would be unjust for a high earner, and might provide a small windfall for the low earner.

The usual and customary standard for determining compensation for time lost is that of past average earnings of an employee for a reasonable period of time. This standard has particular application to the occupation of a cab driver paid on a commission basis. This is the standard which the arbitrator adopts.

The record establishes that the average weekly earning of the grievant for the year prior to his anniversary date of March 9, 1966 was $60.93 per week. It is an undisputed fact that cab drivers derive their earnings not only from the commissions paid them by the company but by tips or gratuities paid to them by customers. No record was kept by the company of tips earned by drivers until January 1966. The grievant offered no evidence to establish what his earnings were from tips for the period in question for the calendar year 1965 although he filed a federal income

tax return for that year and presumably the return reflected his tips. The only evidence of tips in the record is that supplied by the grievant to the company for the first three months of 1966. The average weekly tips established by this record is $11.30. In the absence of any other evidence of tips received by the grievant, the arbitrator is left with no alternative except to use the evidence supplied to him by the company. On this basis, if the average of $11.30 is added to the average weekly earnings of $60.93, his loss of compensation on a weekly basis is $72.23 and for the forty-two weeks in question totals $3,033.66.

2. Vacation Pay

Article X sets forth the provisions for the collective agreement with reference to vacations. It reads as follows:

"Article X Vacations

"Section 1—Every chauffeur employed by the Company who has been employed by the Company continuously for a period of one (1) year or more shall receive one (1) week's vacation of six (6) days during each year with pay, and every chauffeur employed by the Company continuously for three (3) years or more shall receive two (2) weeks' vacation of twelve (12) days during each year with pay, and every chauffeur employed by the Company continuously for twelve (12) years or more shall receive three (3) weeks' vacation of eighteen (18) days during each year with pay, provided in each instance that he has during the preceding twelve (12) months worked a total of two hundred twenty-five (225) days or more. Loss of working days due to verified illness shall be treated as days worked for this purpose. The eligibility of said chauffeur for a vacation shall be determined on the anniversary date of his employment

of each year, and the pay during each week of such vacation shall be equal to the average weekly pay received by such chauffeur during the twelve (12) months immediately preceding such anniversary date, provided, however, that all such vacations shall be taken within twelve (12) months after the anniversary date upon which such chauffeur becomes eligible for a vacation and the time of such vacation shall be arranged by the Company in such manner as to permit continuous and uninterrupted service to the public. Every chauffeur shall have the right to waive his right to a vacation and continue to work without waiving his right to receive the vacation pay provided in this paragraph.

"Section 2—Such vacation pay shall be due every chauffeur who has conformed with the above, even though he may elect to resign or is discharged. Such vacation pay shall be due a chauffeur who has conformed with the above who has been incapacitated or who has died."

As will be seen from the foregoing language an employee to qualify to receive a vacation must establish that during the twelve months preceding his anniversary date he worked a total of 225 days or more. In determining days worked the contract provides, "Loss of working days due to verified illness shall be treated as days worked for this purpose."

The record shows that the grievant worked a total of 224 days during the twelve-month period in question. In order to qualify for a vacation the burden was upon him to establish at least one day of verified illness. The arbitrator interprets the words "verified illness" to mean that some type of information be supplied to the company by the employee which would support his claim of illness. Without attempting to list all types of verification, the

obvious forms of certificates would be a doctor's certificate, hospital record or some similar type of documentation.

The grievant testified generally that he had some thirty days of illness during the period in question but was unable to establish any period in which he had doctor's care during the year preceding his anniversary date. Grievant made a reference to one illness for which he was attended by a physician but was not sure whether it was the year 1964 or 1965. He makes no claim that he supplied a doctor's certificate or any other evidence if illness to the company for any of the days of illness during the twelve month period in question. The hearings with relation to this issue have extended over two days with at least a month in between. The grievant has had ample opportunity to obtain information with relation to his claimed illness.

In the absence of any proof of a "verified illness" the arbitrator has no alternative under the contract except to deny the claim for vacation pay. The arbitrator recognizes that this may be a harsh result in view of the fact that the grievant admittedly worked 224 days out of the year in question and was missing only one day. But the arbitrator has no jurisdiction to change the contract of the parties and the contract clearly and unequivocally requires the showing of verified illness. This showing was not satisfied in this case and accordingly the supplemental award of the arbitrator will not include any compensation for vacation for the year in question.

## Supplemental Award

The award of February 28, 1967 ordered payment for time lost and vacation pay, the amount thereof to be agreed upon by the parties, the award reserving jurisdiction of the arbitrator to resolve any dispute relating thereto. The parties having been unable to agree on the amount to be paid grievant for time lost and vacation pay, submitted the matter to the arbitrator. On the basis of the record made before him and the preceding opinion, the arbitrator makes this supplemental award to the award of February 28, 1967 as follows:

The company shall pay the grievant the sum om $3,033.66 representing compensation due him for all time lost from the date of his discharge to the date of this award. The claim for vacation pay is denied.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 7th day of June, 1967.

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AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

* * (Caption—No. 51 30 0202 66) * *

Extension of Period Within Which Arbitrator Reserves Jurisdiction to Resolve Issue of Backpay.

In the award of the arbitrator dated February 28, 1967 the arbitrator reserved jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of backpay for the grievant. The arbitrator has been informed by letter from counsel for the grievant dated March 28, 1967 that the dispute

concerning the computation of backpay for the grievant has not as yet been resolved and requesting that the arbitrator extend the period for resolving this dispute.

Inasmuch as the dispute concerning the computation of backpay for the grievant has not as yet been resolved, the arbitrator extends the period within which he will exercise jurisdiction for the sole purpose of resolving any dispute concerning the computation of backpay for the grievant for a period of sixty days from the date hereof.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 29th day of March, 1967.

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AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

• • (Caption—No. 51 30 0202 66) • •

Additional Extension of Period of Time Within Which Arbitrator Reserves Jurisdiction to Resolve Issue of Backpay.

In the award of the arbitrator dated February 28, 1967, the arbitrator reserved jurisdiction for a period of thirty days for the sole purpose of resolving any dispute concerning the computation of backpay for the grievant. On March 29, 1967, it appearing that the dispute concerning the computation of backpay had not as yet been resolved, the arbitrator entered an order extending the period within which the arbitrator reserved jurisdiction for a period of sixty days. During the intervening period several hearings have been held with the parties concerning the computation of backpay and the issue of determining the amount of backpay was submitted by the parties to the arbitrator on May 24, 1967.

In view of the fact that some time may be necessary for the arbitrator to prepare a supplemental or amended award reflecting the matters presented to him, the parties at the hearing agreed that the time within which the arbitrator shall hear and determine the dispute with relation to backpay should be further extended for a period of thirty days.

Accordingly, the arbitrator extends the period [within] which he will exercise jurisdiction for the sole purpose of resolving the dispute concerning the computation of backpay for an additional period of thirty days from the date hereof.

/s/ Alex Elson
Alex Elson, Arbitrator

Entered at Chicago, Illinois
this 25th day of May, 1967.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968.

**No. 631**

YELLOW CAB COMPANY, A MAINE CORPORATION,

*Petitioner,*

*vs.*

DEMOCRATIC UNION ORGANIZING COMMITTEE, LOCAL 777, S. I. U. N. A., AFL-CIO.

*Respondent.*

## MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD A. KATZ,
IRVING M. FRIEDMAN,
*Counsel for Respondent.*

Of Counsel:
KATZ & FRIEDMAN,
7 South Dearborn Street,
Chicago, Illinois 60603.

December 6, 1968.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968.

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**No. 631.**

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YELLOW CAB COMPANY, A MAINE CORPORATION,
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*vs.*

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*Respondent.*

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## MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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### QUESTION PRESENTED.

Did the Court of Appeals correctly affirm the judgment of the District Court which granted summary judgment enforcing the arbitrator's award, where the Court of Appeals found that the arbitrator had drawn the essence of his award from the collective bargaining agreement in finding (1) an employee's discharge wrongful and (2) that the union had satisfied the procedural requirements of the contract in bringing the employee's discharge to arbitration?

## STATEMENT.

The petitioner is an employer that operates a fleet of taxicabs in Chicago, Illinois. Its collective bargaining agreement with the respondent labor organization contains a grievance procedure terminating in final and binding arbitration (App. 12).[1]

The Company had discharged an employee, and the Union grieved and subsequently requested arbitration. An arbitrator was mutually selected by the parties and the case was arbitrated under the procedures of the American Arbitration Association (App. 14-15). The Company contended that the Union had not filed the grievance in proper form and that the Union had not made a timely request for arbitration. The arbitrator considered and overruled these procedural objections (App. 24-25). As to the merits, he found that there had not been just cause for the discharge and he ordered the Company to pay the employee backpay to the date of the award (App. 30). The arbitrator denied reinstatement, however, on the ground that the employee had engaged in conduct subsequent to the wrongful discharge which rendered reinstatement inappropriate (App. 37).

After the Company filed in the District Court a petition to set aside the arbitrator's award, the parties filed cross motions for summary judgment. The district judge granted the Union's motion for summary judgment, finding that the arbitrator had not exceeded his authority under the collective bargaining agreement and that there was no showing of bias or partiality in the award. He further held that the arbitrator had considered and ruled on the Company's pro-

1. References to the printed appendix, certified by the Clerk of the Court of Appeals, are designated "App. ....." References to the separate printed appendix filed by petitioner are designated "P. A. .....".

cedural objections and that these matters were for the arbitrator to determine (P. A. 1-3).

On appeal the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, holding that the arbitrator's decision drew its essence from the collective bargaining agreement, both as to the merits and as to the procedural issues. The Court of Appeals rejected the Company's contention that the arbitrator was biased, and it held that the remedy which the arbitrator fashioned was within his discretion (Appendix A).[2]

2. The opinion of the Court of Appeals is printed as Appendix "A" to the petitioner's brief, pages 1a to 5a.

## ARGUMENT.

The issue in the present case does not warrant review by this Court on certiorari. The petitioner is seeking to have the Court review the merits of the arbitrator's award, and it attempts by semantic devices to bypass the settled law that the merits of an arbitrator's award as to substantive and procedural matters are not to be reviewed by the courts.

Contrary to the contention of petitioner, there is no genuine conflict between the Circuit Courts. The decision of the Second Circuit Court of Appeals in *Torrington Co.* v. *Metal Products Workers Union,* 362 F. 2d 677 (1966), the only circuit court decision relied upon by the petitioner, is not in conflict with the present case. In *Torrington,* the Second Circuit stated that it accepted the basic principle that an arbitrator's decision on the merits is final as to questions of law and fact, and that the courts should not review the merits of an arbitrator's award so long as the award draws its essence from the collective contract (362 F. 2d 677, 680). This principle was followed in the present case by the Court of Appeals, as it has been followed in various other circuits which have considered this issue, *e.g., Kroger Co.* v. *Teamsters Local 661,* 380 F. 2d 728 (6th Cir. 1967); *Safeway Stores* v. *American Bakery Workers Local 111,* 390 F. 2d 79 (5th Cir. 1968); *Western Iowa Pork Co.* v. *Packinghouse Workers Local 52,* 366 F. 2d 275 (8th Cir. 1966); *Ficek* v. *Southern Pacific Co.,* 338 F. 2d 655, 656 (9th Cir. 1964), certiorari denied 380 U. S. 988 (1965); *Avco Corp.* v. *Mitchell,* 336 F. 2d 289, 291 (6th Cir. 1964); *Minute Maid Co.* v. *Citrus Workers,* 331 F. 2d 280 (5th Cir. 1964) (per curiam); *Newark Stereotypers Union No. 18* v. *Newark Morning Ledger Co.,* 397 F. 2d 594 (3rd Cir.

1968), certiorari denied, 69 LRRM 2653 (1968). The circuit courts, including the Second Circuit in *Torrington*, have adhered to the basic rule laid down by the Supreme Court in *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960), that the Courts are not to review the merits of an arbitration award. On this issue there is no conflict.

In *Torrington*, however, the Second Circuit went on to deal with an issue which is not contained in the present case, *i.e.*, whether the arbitrator had authority to base an award upon a practice which had existed outside the contract with no express contractual provision covering the subject matter of the grievance. The Second Circuit held that in such case the award did not draw its essence from the collective contract (362 F. 2d 677, 682). In the present case, in complete contrast, the arbitrator based his award upon express contract provisions which protect employees against discharge without just cause (App. 9-11). As *Torrington* involves a review of an arbitrator's award based upon a substantive right *outside* the labor contract, and the present case involves an award based upon a substantive right *within* the labor contract, the two cases are fundamentally different. *Torrington* is not in point. There is no basis for the petitioner's claim that there is a conflict between the circuits.

Petitioner makes a specious argument in contending that there should be court review of the arbitrator's assumption of jurisdiction in the present case. But there was no real question of the arbitrator's jurisdiction. The issues raised by the Company were not jurisdictional, but procedural, *i.e.*, whether the Union had satisfied the contractual procedures with respect to the form of the grievance and the timeliness of the demand for arbitration. It is settled law that these procedural issues called for the arbitrator's construction of applicable language of the contract. They are not for the courts to decide. *John Wiley & Sons, Inc.* v.

*Livingston*, 376 U. S. 543, 557, 559 (1964); *Avco Corp.* v. *Mitchell, supra*, 336 F. 2d 289, 291 (6th Cir. 1964), where the court held squarely that the question of compliance with preliminary steps in the grievance procedure is procedural, and that it is for the arbitrator and not the courts to decide; *Local 824, Carpenters* v. *Brunswick Corporation*, 342 F. 2d 792, 794 (6th Cir. 1965), where the court said: "It is no longer open to question that procedural matters are for the arbitrator, and not the court, to determine"; *Local 51, I. B. E. W.* v. *Illinois Power Co.*, 357 F. 2d 916, 919 (7th Cir. 1966), certiorari denied, 385 U. S. 850 (1966); *Deaton Truck Line, Inc.* v. *Local Union 612*, 314 F. 2d 418, 422 (5th Cir. 1962); *Radio Corp. of America* v. *Assn. of Pro. Eng. Personnel*, 291 F. 2d 105, 110 (3rd Cir. 1961). Recently the Court denied certiorari in a case where the procedural rulings of an arbitration panel were attacked and where, as here, the provisions of the United States Arbitration Act 9 U. S. C. §§ 9, 10 were relied upon. *Newark Stereotypers Union No. 18* v. *Morning Ledger Co.*, 397 F. 2d 594 (3rd Cir. 1968), certiorari denied, 69 LRRM 2653, (November, 1968).

The Company and the Union agreed in their contract that the arbitrator's award should be "final, conclusive and binding upon all parties." (App. 12.) To subject the procedural rulings of the arbitrator to court review would mean that labor arbitration awards would no longer be final and binding despite the agreement of the parties, but would instead become independently reviewable by the courts on the same issues which were litigated and disposed of by the arbitrator. This would destroy the finality of arbitration awards. It would have the undesirable result that awards would become the beginning rather than the end of industrial disputes, and it would make a jurisdictional issue out of trifling procedural matters. When it is considered that virtually all industrial arbitrations fol-

low grievance procedures which are handled by laymen on both sides, it is readily apparent that chaos would result.

Finally, petitioner argues somewhat indirectly that the arbitrator showed "partiality" because he ordered back-pay while denying reinstatement to the grievant. Inasmuch as the denial of reinstatement was a substantial award in favor of the Company, it is difficult to understand how the charge of partiality can even be suggested. The district court and the Court of Appeals rejected the contention (App. 54; App. "A", page 5a). The Court of Appeals reasonably pointed out that the contract left the arbitrator free to exercise his discretion in devising a remedy, and that there was no inconsistency in the remedy because it was *after* the grievant had been wrongfully discharged that he engaged in the conduct which caused the arbitrator to deny reinstatement. In *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960) the Court recognized the need for flexibility in remedies devised by arbitrators. See also *Kroger Co.* v. *Teamsters Local 661, supra,* 380 F. 2d 728, 732. The petitioner really contends that the arbitrator was "partial" because he did not rule in favor of the petitioner. The rather tasteless and unwarranted claim of partiality is simply a semantic device of the petitioner to make the petition appear to be something other than what it is, *i.e.*, an effort to obtain a review of the merits of the arbitrator's award.

There are no special or important reasons for this case to be reviewed by the Court. There is no conflict among the circuit courts. The judgment below is consistent with applicable decisions of this Court.

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD A. KATZ,
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No. 631

In the
# Supreme Court of the United States
OCTOBER TERM, 1968

YELLOW CAB COMPANY,
a Maine corporation,

*Petitioner,*

*vs.*

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

*Respondent.*

## PETITIONER'S REPLY BRIEF

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# PETITIONER'S REPLY BRIEF

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Several erroneous assertions in Respondent's Memorandum opposing the Petition herein require this response.

1.

## A REVIEW OF THE MERITS OF THE AWARD IS NOT BEING SOUGHT.

The substantive issue in the arbitration proceeding was whether the employee's discharge was just or unjust. The decision on this issue constitutes "the merits of the award." No review of the decision of this issue was

requested[1] either of the District Court or of the Court of Appeals; nor is such a review by this Court sought by the Petitioner.

Jurisdictional questions do not constitute "the merits" and it is only the arbitrator's ruling concerning his own jurisdiction of which review has been requested by the Petition.

2.

**THERE IS A CONFLICT BETWEEN THE CIRCUITS.**

In *Torrington*[2] it was held that an arbitrator could not be permitted to *add* to the contract a provision not stated therein. In this case the arbitrator *violated* a provision already there, i.e., that grievances be placed in writing and appealed within certain prescribed periods.

There can be no valid distinction between the nature of these two rulings so as to deny the existence of a conflict. The opposing Circuit Court rulings deal with the same standard labor contract provision which denies power and jurisdiction to *modify* or *alter* the contract as well as to *add to* its provisions. To distinguish the act of an arbitrator modifying, altering or violating the contract from his act in adding to it would create a distinction without a supportable difference. A decision affirming an arbitrator's unrestrained power to modify, alter, or violate stated contract provisions while denying his right to supplement them would be an affront to rational fairness.

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[1] On this point, also, the award was incomprehensible. The driver either was supersensitive to small amounts of fumes or imagined non-existent fumes. A warning to him before discharge could not have changed this condition and would have served no sensible purpose.

[2] *Torrington Co.* v. *Metal Product Workers Union,* 362 F. 2d 677 (CA 2, 1966).

3.

**AN ARBITRATOR'S RULING ON HIS OWN JURISDICTION IS SUBJECT TO JUDICIAL REVIEW.**

The decisions cited by Respondent indicating jurisdictional matters are "for the arbitrator to decide" concern proceedings to compel arbitration. In those cases arbitration had not yet taken place; therefore there was no decision which could be reviewed. While ordering that arbitration proceed, the Courts have recognized that, *after an award is issued,* it is subject to judicial review. Upon such review, jurisdictional matters are for the *Court* to decide.

This Court has pronounced that an award should not be enforced when it does not "draw its essence from the collective bargaining agreement," dispenses the arbitrator's "own brand of industrial justice" or manifests "an infidelity to [his] obligation" under the Agreement.[3]

Enforcement is unlikely to be denied without a review.

4.

**THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION.**

More than 5,000 cases, it is estimated,[4] concerning timeliness or writing requirements applicable to grievances were

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[3] See quotations from *Enterprise* and *Livingston* stated on pages 8 and 9 of the Petition.

[4] The digest of the B.N.A. Labor Service under headings § 93.466 through §§ 93.4669 shows 202 cases reported in Volumes 21 through 49 of the B.N.A. Labor Arbitration Reports. These cover the period from September, 1953, through February, 1968. It is estimated that only 4% of arbitration awards issued find their way into publication. *Hayes, Labor Arbitration* — A Dissenting View, p. 53 (Yale Univ. Press, 1966). 202 cases reported are 4% of 5,050 cases estimated to have been arbitrated.

arbitrated between September, 1953 and February, 1968. Over the entire period this amounts to almost 350 such cases per year. The total number of *all* arbitrated disputes concerning an arbitrator's jurisdiction is, of course, far greater.

This Court, by a decision in this case, can materially reduce the number of disputes in the future through an authoritative pronouncement of the principles controlling an arbitrator's determination of his own jurisdiction.

## C.

## THE U.S. ARBITRATION ACT DOES REQUIRE A REVIEW OF THE ARBITRATOR'S RULING HEREIN.

Within the last few weeks this Court applied the U. S. Arbitration Act and vacated an award where an arbitrator failed to disclose to one party a previous sporadic business relationship with the other party.[5] In that case no bias was alleged against the arbitrator and there was no reason to suspect that he was actually biased.

Here, bias evident on the face of the award is charged. Here, also, it is charged that the arbitrator exceeded his powers. Both allegations present a basis, under the specific wording of the statute, for the award to be vacated.

The U. S. Arbitration Act was also before this Court in the *Newark Stereotypers*[6] case cited by Respondent.

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[5] *Commonwealth Coatings Corp.* v. *Continental Casualty Co. et al* decided November 18, 1968 (No. 14 October Term 1968)

[6] *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, 397 F. 2d 594 (CA 3, 1968), cert. den. November 18, 1968 (No. 498 October Term 1968)

In that case the district court did review the arbitrators' ruling. No bias was alleged. The contested conduct was held not to have affected the fairness of the proceeding.

Thus in two separate cases resolved on the same day (one of which concerned arbitration of a labor dispute), this Court has upheld a review of an arbitration decision through application of the Arbitration Act. The basis for the review in those cases was much less compelling than it is here, where the arbitrator's ruling on his own jurisdiction is challenged.

## CONCLUSION

In this ideally suited case this Court should lay to rest the misunderstanding, uncertainty and proliferation of litigation which has emanated from its Steelworkers' trilogy decisions.

Respectfully submitted,

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